IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1539

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, KEAUKAHA-PANAEWA FARMERS ASSOCIATION, ISABEL LEINANI KNUTSON, ERMA KALANUI and APRIL KAMAKAOKALANIMALUNAO'E KALANUI, by her guardian ad litem, ERMA KALANUI, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees,

vs.

HAWAIIAN HOMES COMMISSION, BILLIE BEAMER, in her capacity as Chairman of the Hawaiian Homes Commission, THE DEPARTMENT OF HAWAIIAN HOME LANDS,

Defendants-Appellants,

and

COUNTY OF HAWAII, EDWARD HARADA, in his capacity as Chief Engineer, County of Hawaii,

Defendants,

and

JAMES W. GLOVER, LTD., A Hawaii Corporation,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other References: Page

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OPINIONS BELOW

The district court issued a written Denial of Motions to Dismiss (Appendix A) and Findings of Fact, Declarations and Conclusions of Law, and Order (Appendix B)

which are not reported. The court of appeals, after obtaining the opinion of the United States as amicus curiae (Appendix C), issued an opinion which, as amended on denial of rehearing and rehearing en banc, (Appendix D) is reported at 588 F. 2d 1216.

JURISDICTION

The judgement of the court of appeals was entered on September 18, 1978. A timely petition for rehearing and rehearing en banc was denied on January 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Do Native Hawaiian beneficiaries of the Hawaiian Homes Commission Act, adopted by Congress for their especial benefit, have the right to obtain judicial review in federal court of violations of the Act and breaches of trust provisions imposed on the Hawaiian Homes program by Congress in the Hawaii Admission Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are set out in Appendix E:

1. The Hawaiian Homes Commission Act, 1920, § 202, 204, 205, 206, 207, Act of July 9, 1921, C. 42, 42 Stat. 108.

2. The Hawaii Admission Act §§ 4, 5, An Act to Provide for the Admission of the State of Hawaii into the Union, Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4.

3. 28 U.S.C. § 1331.

STATEMENT OF THE CASE

Native Hawaiian beneficiaries of the Hawaiian Homes Commission Act of 1920[1] brought this class action to prevent the unlawful use of their trust lands by non-beneficiaries of the HHCA. The Native Hawaiians sought declaratory and injunctive relief to prevent violations of the express provisions of the HHCA and to remedy breaches of the trust provisions imposed by Congress upon the Hawaiian Homes program in Sections 4 and 5 of the Hawaii Admission Act.[2]

The Defendant moved to dismiss on jurisdictional grounds and the district court denied the motions. The district court held that Native Hawaiians had properly invoked jurisdiction under 28 U.S.C. § 1331 over violations of the HHCA, which it found to be a federal law, and over breaches of the trust provisions of Section 5(f) of the Admission Act, also a federal law. The district court relied in part upon an earlier federal district court opinion by Judge Martin Pence in *Kila v. Hawaiian Homes Commission*, Civ. No. 74-12 (9/17/74, D.C. Haw.) (Appendix F) which also concluded that allegations of violations of the HHCA raise substantial federal questions.

Subsequently, the district court granted the Native Hawaiians' Motion for Partial Summary Judgment, finding that the Defendants had allowed more than 25 acres of prime agricultural Hawaiian home lands to be unlawfully used for a county flood control project to the detriment of Native Hawaiian beneficiaries.[3] The district

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[1] Act of July 9, 1921, C. 42, 42 Stat. 108, hereafter "HHCA."

[2] An Act to Provide For the Admission of the State of Hawaii into the Union, Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4, hereafter "Admission Act."

[3] The district court's findings are set out in Appendix B herein.

court also found that a portion of the lands involved were intended to be exchanged for state lands of equal value to accommodate the flood control project, but that no actual exchange had been agreed upon; the requisite approvals for land exchanges, including the approval of the United States Secretary of the Interior, had never been sought or obtained for the exchange of this prime agricultural land, in violation of § 204(4) of the HHCA. The district court further found that because of repeated failures to comply with land exchange requirements, the Hawaiian Homes Commission was allowing more than 1,700 acres of Hawaiian home lands to be used by non-beneficiaries under an intention to exchange lands, but that no exchanges had ever been approved since at least 1972, no state lands had ever been received in exchange by the Hawaiian Homes Commission for these 1,700 acres of trust land, and no compensation had been obtained for their use. The district court further found a violation of § 207 (c)(1) of the HHCA because the Hawaiian Homes Commission issued a license to the defendant county for the flood control project in the midst of the litigation (back dated to January 1, 1976) for an unauthorized purpose and for only the nominal consideration of $1 per year.

Finally, the district court held that the defendants had breached their trust duties under the Admission Act by (1) failing to exercise the care and skill required of a trustee in the management of trust property, (2) by failing to adhere to the terms of the trust embodied in the HHCA, (3) by failing to act exclusively in the interest of the Native Hawaiian beneficiaries, and (4) by failing to hold and protect the trust property for the beneficiaries.

The Hawaiian Homes Commission, the Department of Hawaiian Home Lands, and the Chairman appealed the district court decision to the Ninth Circuit challenging the decision on the merits and also challenging the district court's jurisdiction. After hearing oral argument, the circuit court requested an amicus curiae brief from the United States regarding the jurisdictional aspects of the appeal. The United States submitted an amicus curiae brief (Appendix C) supporting jurisdiction over the Native Hawaiians' Admission Act claims of breaches of trust, but arguing that the HHCA was no longer federal law.

The court of appeals reversed the district court on jurisdictional grounds, holding that Native Hawaiian beneficiaries of the HHCA have no right of action to challenge breaches of trust under § 5(f) of the Admission Act. Section 5(f) provides in pertinent part as follows:

> The lands granted to the State of Hawaii by subsection (b) of this section [including Hawaiian home lands] together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust . . . for the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, . . .[T]heir use for any other object shall constitute a breach of trust for which suit may be brought by the United States. . .

The court of appeals held that the right to bring suit for such breaches of trust is reserved exclusively to the United States. The circuit court also suggested that Native Hawaiians do not have a right of action to enforce the terms of the HHCA even in state court, but left that question for possible presentation to the state courts.

The circuit court further held that, while the HHCA may technically remain a federal law, the Hawaiian Homes program has become "for all practical purposes" a matter of state concern. Therefore, the court of appeals concluded that a claim arising under the HHCA does not raise a federal question, applying the rule of *Gully v. First National Bank*, 299 U.S. 109 (1936).

Native Hawaiians petitioned for rehearing and rehearing en banc, urging that Native Americans have the right to bring suit to protect their trust property under this Court's ruling in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) and under the Ninth Circuit's own "co-plaintiff rule" developed in *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F. 2d 465 (9th Cir. 1975), *cert. denied*, 423 U.S. 874 (1975), *Moses v. Kennear*, 490 F.2d 21 (9th Cir. 1973), and *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). The Native Hawaiians further demonstrated that Congress has retained ultimate authority over and has federal review powers over the administration of the Hawaiian Homes program, thus evidencing the continuing federal status, as a "practical" matter, of the HHCA. Nevertheless, the Native Hawaiians' petition for rehearing and rehearing en banc was denied.

REASONS FOR ALLOWANCE OF THE WRIT

I.

THIS ACTION INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

The court of appeals' decision, unless reversed by this court, as a practical matter, may foreclose all Native Hawaiians from seeking judicial review under 28 U.S.C. § 1331 of breaches of trust and violations of the HHCA in the administration of the Hawaiian Home Lands.[4] The ruling will seriously frustrate these Native Americans in their efforts to fully realize the benefits which Congress intended for them when it created the Hawaiian Homes program almost sixty years ago.

The facts in this action alone demonstrate that during the last fifteen years more than 1,700 acres of Hawaiian Home Lands have been misappropriated in violation of trust duties and HHCA land exchange provisions. Yet the court of appeals decision denies all Native Hawaiian beneficiaries the right to seek relief for these blatant abuses. Summary Judgment in a simila. action, *Aki v. Beamer*, Civ. No. 76-0144, (2/28/78, D.C. Haw.) was recently vacated on the authority of the court of appeals decision in this case. In *Aki v. Beamer*, the district court had found that the practice of administratively expropriating Hawaiian Home Lands for use by state agencies through

[4] The decision precludes any action in any court for breaches of trust in violation of Section 5f of the Admission Act. Additionally, the opinion suggests but does not decide that Native Hawaiians may have no private right of action to redress violation of the HHCA, even in state court. *See* Appendix D, p. 24a; 588 F.2d 1216, 1224.

the issuance of Governor's Executive Orders was a violation of the HHCA. That practice affects many thousands of acres of Hawaiian Home Lands.

The performance of the Hawaiian Homes program in general has fallen far short of meeting the needs of Native Hawaiians. As of the time of the filing of this action the Annual Report of the Department of Hawaiian Home Lands (Record on Appeal 322-327, Exhibit DD to Affidavit of Beamer, pp. 55-56) shows that since the inception of the Hawaiian Homes program only 2,260 Native Hawaiian families had been awarded parcels of trust land. The awards total only 25,252 acres out of the more than 200,000 acres set aside for Native Hawaiians by Congress. The waiting list for awards at that time numbered 4,607 families. Nevertheless, almost 150,000 acres, or approximately 75% of these trust lands, were being used by non-beneficiaries of the HHCA under general leases, licenses, Governor's Executive Orders, pending land exchanges and other forms of tenancy. The court of appeals, while admitting that the Native Hawaiians' argument that the HHCA is a federal statute for the purposes of 28 U.S.C. § 1331 bears "a degree of logical and technical appeal," nevertheless reasoned under the "common-sense" approach of *Gully v. First National Bank*, 299 U.S. 109 (1936), that Native Hawaiians had not stated a federal claim under the HHCA because, "[e]ven though the historical source of these rights was a federal statute, it is the clear state *nature* of the rights which governs our decisions." (Emphasis in the original.) *See* Appendix D, p. 24a, 588 F.2d, 1216, 1226.

In reaching its conclusion that the United States had relinquished control over the Hawaiian Homes program to the State of Hawaii, and concluding that the HHCA is

primarily a matter of state concern, the court of appeals overlooked five significant statutory provisions: (1) The United States retained the right to bring suit against the state to enforce the trust provisions of the Admission Act;[5] (2) Congress retained the right to unilaterally amend or repeal the HHCA which it created;[6] (3) Congress prohibited substantive amendments to the HHCA without its approval;[7] (4) The approval of the United States Secretary of the Interior is required for any proposed exchange of Hawaiian Home Lands for state lands;[8] and (5) The federal lands which were unencumbered at the time of Hawaii's admission to the Union.[9] These reservations of federal control over the Hawaiian Homes program demonstrate conclusively that the HHCA is a federal statute and that there is a strong continuing federal interest in the proper administration of this trust which Congress created in recognition of the United States' obligations to Native Hawaiians. If Congress had intended to completely transfer the program to the state and relinquish its control, it would not have reserved the power to unilaterally amend the HHCA or to prohibit substantive amendments without its approval. It would certainly not retain the right to repeal the HHCA if it had already repealed the act by implicatioh. Finally, if the HHCA is only a state law as concluded by the court of appeals, then it is difficult to understand how a state law could legally bind the United

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[5]Section 5f of the Admission Act.

[6]Section 223 of the HHCA.

[7]Section 4 of the Admission Act.

[8]Section 204(4) of the HHCA.

[9]Section 5(h) of the Admission Act.

States Secretary of the Interior to exercise a review function in the land exchange process as required by § 204(4) of the HHCA. Fundamental principles of supremacy make it clear that no state law can impose any duties upon a federal official. Yet the review function of the Secretary of the Interior is a provision of the HHCA imposed by Congress and amendment of that provision was forbidden by Congress without its consent. These indicia of federal control clearly establish that the HHCA is a federal statute for the purpose of 28 U.S.C. § 1331.

The court of appeals applied the "common-sense" analysis of *Gully v. First National Bank, supra*, and concluded that even though the HHCA is the historical source of the rights of Native Hawaiians and is a federal statute, the HHCA, has now acquired a "state nature." That analysis is based upon the mistaken conclusion that the federal government has relinquished its control over the Hawaiians Homes program and abandoned its trust responsibilities to Native Hawaiians. A similar analysis was thoroughly rejected by this Court in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). In *Oneida* the argument was made that the well-pleaded complaint rule barred federal jurisdiction because a mere claim of federal source of title to trust lands of Native Americans[10]

[10]There can be no doubt that Native Hawaiians are a group of Native Americans or "Indians" as that term is used in Article I, Section 8, cl. 3 of the United States Constitution providing for the power of Congress to regulate commerce with the Indian tribes. In *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), the Ninth Circuit Court of Appeals cited with approval an exhaustive opinion of the court of claims in *United States v. the Native Village of Unalakleet*, 411 F.2d 1255 (Ct.Claims 1969), holding that the word "Indian" is commonly used in this country to mean "the aborigines of America." 529 F.2d at 138-139, n.5. Additionally, the Hawaiian Homes Commission Act itself is ample evidence that federal recognition of this Native American group has been extended by Congress.

was not sufficient. The basis of federal jurisdiction was perhaps best explained in the concurring opinion of Justices Rehnquist and Powell. Justice Rehnquist wrote:

> In contrast to the typical instance in which the Federal Government conveys land to a private entity, the Government, by transferring land rights to Indian tribes, has not placed the land beyond federal supervision. Rather, the Federal government has shown a continuing solicitude for the rights of the Indians in their land . . . Thus, the Indians' right to possession in this case is based not solely on the *original* grant of rights in the land but also upon the Federal Government's subsequent guarantee. Their claim is clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility. (Emphasis in original.) 414 U.S. at 684.

Just as in *Oneida*, Congress has demonstrated a continuing federal supervision over and responsibility for the Hawaiian Homes program. Accordingly, Native Hawaiians have properly raised federal claims for the numerous violations of the HHCA found by the district court.

Because of the importance of these issues to the class of Native Hawaiians bringing this action as well as the impact on future generations of trust beneficiaries, this Court should allow the writ to issue to determine the right of Native Hawaiians to seek judicial redress pursuant to 28 U.S.C. § 1331 for breaches of the trust provisions of Section 5(f) of the Admission Act and violations of the HHCA. The trust relationship between the United States and Native Hawaiians established by the HHCA has never been examined by this Court and it is critical to Native Hawaiians that the issues raised in this action be

decided so that Native Hawaiians may finally enjoy the benefits Congress intended for them so long ago.

II.

THE COURT OF APPEALS HAS DECIDED FEDERAL QUESTIONS IN WAYS CONFLICTING WITH DECISIONS OF THIS COURT.

This Court should allow the writ to issue for a second and equally important reason. The court of appeals denied Native Hawaiians a private right of action for reasons directly conflicting with the holdings of this Court, including *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 426 U.S. 463 (1976), and *Cort v. Ash*, 422 U.S. 66 (1975).

The holding of the court of appeals is in conflict with the principles established by this Court in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), where this Court stated, regarding the enforcement of claims of other Native Americans,[11] as follows:

> [T]he agency . . . charged with fulfilling the trust obligations of the United States is faced "with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments. In some cases, the adequate fulfillment of trust responsibilities on these allotments would undoubtedly involve administrative costs running many times the income value of the property." H.R. Rep. No. 2503, 82nd Cong., 2d Sess., 23 (1952). Recognizing these administrative burdens and realizing that the Indian's right to sue should not depend on the good judgment or zeal of a

[11] See Footnote 10, *supra*.

> government attorney, the United States has indicated its support of petitioners' position that Indians have a capacity to sue . . . 390 U.S. 365, 374.

Similarly to *Poafpybitty*, the United States supports the right of Native Hawaiians to bring suit pursuant to 28 U.S.C. §1331 to enforce the trust provisions of Section 5(f) of the Admission Act. (*See* Brief of the United States, *Amicus Curiae*, Appendix C hereto.) In fact, the United States cited *Poafpybitty* as the controlling authority in reaching its conclusion.

More recently, in an action brought by Native Americans in which the United States was not a party, *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), this Court held that Native Americans "in certain respects . . . were to be accorded treatment similar to that of the United States had it sued on their behalf." 425 U.S. 463, 474. Thus, this Court has held not only that Native Americans have the right to bring an action to protect their trust property, but that they also enjoy the immunity of the United States from the application of the anti-injunction statute in tax cases, 28 U.S.C. §1341, even though that immunity is not expressly stated in the statute.[12] Indeed, the Ninth Circuit pointed out in *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465 (9th Cir. 1975), *cert. denied*, 423 U.S. 874

[12] While *Moe* involved an action under 28 U.S.C. §1362, this Court has noted that the only significant difference from an action by Native Americans brought under 28 U.S.C. §1331 is that §1362 relieves Indian Tribes of the $10,000 amount in controversy requirement. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 663.

(1975), that the failure to afford the trust beneficiaries the same rights as the United States when suing on their behalf could lead to inconsistent results. Thus, the court held that the Native Americans enjoyed the same immunity from the application of a state statute of limitations as the United States. The *Capitan Grande* court stated:

> Indian bands and tribes have no assurance that all their claims, or even all their plainly reasonable claims, with respect to trust lands will be pursued in a timely fashion by the United States. Such assurance is precluded by the magnitude of the administrative burdens imposed on the United States by reason of its fiduciary responsibilities, and the inherently discretionary manner in which these responsibilities must be discharged. *To provide such assurance would be substantially illusory were such suits barred by state statutes of limitation more restrictive than that to which the United States would have been subject had it brought the suit.* (Emphasis added.) 514 F.2d 465, 470-71.

The decision of the court of appeals is directly in conflict with the principles of *Poafpybitty v. Skelly Oil Co.*, *supra*, and *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, *supra*, because it denies to Native American beneficiaries the right to bring suit to enforce breaches of trust and unlawful use of their trust lands. The holding completely fails to account for the fact, as recognized by this Court in *Poafpybitty*, that it is completely unrealistic to expect that the United States will be able to vigorously protect the rights of all Native Americans given the enormous burden on the United States. The lack of any action by the United States in light of the long standing abuses in the Hawaiian Homes program, as found by the district court in this

action, amply demonstrates the necessity for allowance of a private right of action by the Native Hawaiian beneficiaries for breaches of trust in the administration of the Hawaiian Home Lands.

The court of appeals has also denied Native Hawaiians a private right of action for enforcement of the trust provisions of the Admission Act by applying a presumption under circumstances rejected by this Court in *Cort v. Ash*, 422 U.S. 66 (1975). The court of appeals examined the legislative history of the Admission Act and was able to find no evidence as to whether or not Congress intended that Native Hawaiians have a private right of action to enforce the trust provision of Section 5f. Nevertheless, the court of appeals applied the Latin maxim *expressio unius est esclusio alterius*, applied by this Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974) (*Amtrak*) to deny Native Hawaiians a private right of action even though that approach was expressly discredited by this Court one year later in *Cort v. Ash*, *supra*.

This Court discussed the application of the *exclusio unius* maxim of *Amtrak* in *Cort v. Ash*, 422 U.S. 66, 82-83 (1975), and declined to apply it where the legislative history failed to show whether there was any Congressional intent regarding a private right of action. In footnote 14 of *Cort*, 422 U.S. at 82, this Court rejected the suggestion that the provision of a private remedy in one title of a particular act implied that no private remedy was intended in another title of the same act. This Court stated:

> 14. We find this excursion into extrapolation of legislative intent entirely unilluminating. In Amtrak, there was a *private* cause of action provided

> in favor of certain plaintiffs concerning the particular provision at issue. It was in this context that we referred to 'a frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.' (Emphasis added.) 422 U.S. 66, 82.

Thus, the Supreme Court limited the application of the maxim to situations where Congress had provided a *limited private* right of action. Where a limited private right of action is provided, it is logical to infer that Congress did not intend a broad general private right of action. That is simply not the case here. The court of appeals expressly acknowledged both that the legislative history is silent on the issue and that no private right of action of any kind is mentioned in the Admission Act. Thus, the *exclusio unius* maxim was applied by the court of appeals under circumstances expressly rejected by this Court.

Additionally, the court of appeals' application of the discredited *exclusio unius* maxim is also directly contrary to this Court's well established rule that ambiguities in Federal treaties or statutes dealing with Native Americans are to be liberally construed in their interest. Indeed, that principle was emphatically affirmed by the Ninth Circuit Court of Appeals itself in *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), where after a careful review of this Court's frequent application of this principle, it stated:

> To resolve the ambiguity . . ., we begin with the fundamental postulate, enunciated in *Worcester v. Georgia, see* 31 U.S. at 393, that ambiguities in Federal treaties or statutes dealing with Indians must be

> resolved favorably to the Indians. *See, McClanahan v. Arizona Tax Commission*, 411 U.S. at 174-175; *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974). This principle is somewhat more than a canon of construction akin to a Latin maxim, easily invoked and as easily disregarded. It is an interpretive device, early framed by John Marshall's legal conscience for insuring the discharge of the nation's obligations to the conquered Indian tribes. The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status toward the Indian—a status accompanied by fiduciary obligations. *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *United States v. Kagama*, 118 U.S. 375 (1886); *Beecher v. Wethery*, 95 U.S. 517, 525 (1877); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12 (1831). While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of the Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations. *See, Squire v. Capoeman*, 351 U.S. 1, 7-8 (1956). 532 F.2d at 660.

See also Bryan v. Itasca County, 426 U.S. 373, 392 (1976), *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976), *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975), *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918), and *Choate v. Trapp*, 224 U.S. 665, 675 (1912). This canon of construction regarding interpretation of ambiguous statutes clearly militates in favor of a finding that Native Hawaiians should be accorded a private right of action to pro-

tect their Hawaiian Homes Lands from being illegally used by non-beneficiaries in violation of the trust imposed by the Admission Act.

CONCLUSION

This Court should issue a writ of certiorari because of substantial federal questions which are of extreme importance to thousands of Native Hawaiians in their efforts to remedy serious abuses of the Hawaiian Home Lands. Unless the writ is granted, these beneficiaries may effectively be precluded from obtaining any judicial review of the substantial trust violations. Additionally, this Court should review the court of appeals' decision because it is inconsistent with the decision of this Court recognizing the right of Native Americans to bring suit to protect their trust property.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 75-0260

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, KEAUKAHA-PANAEWA FARMERS ASSOCIATION, ISABEL LEINANI KNUTSON, ERMA KALANUI and APRIL KAMAKAOKALANIMALUNAO'E KALANUI, by her guardian ad litem, ERMA KALANUI, individually and on behalf of all persons similarly situated,

Plaintiffs,

vs.

HAWAIIAN HOMES COMMISSION, BILLIE BEAMER, in her capacity as Chairman of the Hawaiian Homes Commission, THE DEPARTMENT OF HAWAIIAN HOME LANDS, COUNTY OF HAWAII, EDWARD HARADA, in his capacity as Chief Engineer, County of Hawaii, and JAS. W. GLOVER, LTD., a Hawaii corporation,

Defendants.

DENIAL OF MOTIONS TO DISMISS

Plaintiffs have brought this action "to enjoin further construction of the Waiakea-Uka Flood Control Project which will destroy over 20 acres of available Panaewa agricultural land, because of the diversion of this land to the County of Hawaii for a flood control project violates their rights under §4 of the Admissions Act of 1959, the Hawaiian Homes Commission Act of 1920, and Article XI of the Hawaii State Constitution."

Plaintiffs allege that jurisdiction is conferred on this Court by 28 U.S.C. §1331. Grounds for jurisdiction are also alleged under 28 U.S.C. §§1343 (3) and (4).

Under Section 1331, besides the minimum value of $10,000, the matter in controversy must be one that "arises under the Constitution, laws, or treaties of the United States."

The Admission Act (An Act to Provide for the Admission of the State of Hawaii into the Union) is, of course, a federal law. Such act, in pertinent part, provides as follows:

> §4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, [HHCA] shall be adopted as a provision of the Constitution of said State...subject to amendment or repeal only with the consent of the United States, and in no other manner:.....
>
> §5. . .(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income thereform, shall be held by said State as a public trust...for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, ... [T]heir use for any other object shall constitute a breach of trust for which suit may be brought by the United States...
>
> (h) All laws of the United States reserving to the United States the free use or enjoyment of property

> which vests in or is conveyed to the State of Hawaii... shall cease to be effective upon the admission of the State of Hawaii into the Union.

Pursuant to Section 4 of the Admission Act, the HHCA was adopted as Article XI of the Hawaii State Constitution. The HHCA was first enacted by the United States Congress in 1921. Act of July 9, 1921, ch. 42, 42 Stat. 108. Until Hawaii's admission into the Union as a state in 1959, the Act was codified in 49 U.S.C. § 691 *et seq.*

In *Kila v. Hawaiian Homes Commission*, Judge Pence stated: "Upon Hawaii's admission the Act acquired a unique, hybrid character... The omission of the Act from Title 48 makes suspect its status as a federal law. In §4 of the Admissions Act, the act admitting Hawaii to the Union as a state, however, Congress compacted with the State that Hawaiian Homes Commission Act, 1920, as amended, must be adopted as a provision of the State Constitution. The Act was therefore adopted as a law of the State of Hawaii in the State Constitutuion as Art. XI, §§ 1, 2. The HHCA, 1920, thus now appears to be a Federal law, a State law, and also the substance of a compact between the United States and the State of Hawaii." [1]

This court concurs in the above conclusion. The Admission Act, if not in *haec verba*, at least in intent, incorporated the HHCA. *See* Section 4 thereof. This is buttressed by the trust provisions of Section 5(f). Section 5(h) which provides for the cessation of "[A]ll laws of the United Stated reserving to the United States the *free use or enjoyment* of property which vests in or is conveyed

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[1] Kila v. Hawaiian Homes Commission, Civ. No. 74-12 (9/17/74, D.C. Haw.) at pp. 4-5.

to the State of Hawaii..." (emphasis added) could be construed to mean that all other pertinent laws of the United States remained in full force.

Accordingly, this court concludes that both the HHCA and the Admission Act confer jurisdiction on it under 28 U.S.C. 1131. The motions to dismiss made by respective defendants are, therefore, hereby DENIED.

DATED: Honolulu, Hawaii, September ___ , 1975.

United States District Judge

APPENDIX B

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BEN HARRY GADDIS
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 75-0260

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, et al.,

Plaintiffs,

v.

HAWAIIAN HOMES COMMISSION, et al.,

Defendants.

I. FINDINGS OF FACT

This action came on for hearing before the Court, Honorable Dick Yin Wong presiding, and based upon the record herein, the briefs, and the arguments of counsel, the Court finds as follows:

1. Plaintiff KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION is a non-profit corporation composed of native Hawaiians who are lessees or qualified applicants for leases administered under the Hawaiian Homes Commission Act of 1920 (hereinafter "HHCA").

2. Plaintiff KEAUKAHA-PANAEWA FARMERS ASSOCIATION is an unincorporated association whose membership is composed of native Hawaiians who are lessees or applicants for leases on Hawaiian Homes agricultural lands administered under the HHCA.

3. Plaintiff ISABEL LEINANI KNUTSON is a qualified applicant for a Hawaiian Homes agricultural lease at Panaewa, Hawaii, and was 35th on the waiting list for such leases at the time this action was initiated.

4. Plaintiff ERMA KALANUI is a qualified applicant for a Hawaiian Homes agricultural lease at Panaewa, Hawaii, and was 41st on the waiting list for such leases as of August 6, 1976.

5. The above-described Plaintiffs represent a class of persons of more than 50% aboriginal Hawaiian blood (native Hawaiians) who are qualified under the terms of the HHCA to lease Hawaiian home lands at Panaewa, Hawaii. As such, Plaintiffs are beneficiaries under the HHCA.

6. Plaintiff APRIL KALANUI was a fourteen year old minor child who is 75% native Hawaiian who will be eligible to lease agriultural land at Panaewa when she attains her majority. Her mother ERMA KALANUI was appointed guardian ad litem to represent her interested in this action.

7. Defendant HAWAIIAN HOMES COMMISSION, (hereinafter "Commission"), is a state commission which is charged with the responsibility for administering and implementing the HHCA.

8. Defendant BILLIE BEAMER (hereinafter "Beamer"), is Chairman of the Hawaiian Homes Commission and is Director of the Department of Hawaiian Home Lands. She has primary responsibility and authority

for developing and presenting to the Commission plans for lands entrusted to the Department of Hawaiian Home Lands as well as authority, with the approval of the Commission, to enter into binding contractual arrangements on behalf of the Commission.

9. Defendant DEPARTMENT OF HAWAIIAN HOME LANDS, (hereinafter "Department"), is the state agency charged with administering the HHCA under the direction of the Commission and Director of the Department.

10. Defendant COUNTY OF HAWAII, (hereinafter referred to as "County", is the corporate body of the island of Hawaii vested with the power to authorize and contract for the construction of public works within its boundaries.

11. Defendant EDWARD HARADA (hereinafter "Harada"), is the Chief Engineer for the County of Hawaii and is the County official responsible for the supervision of the construction of a public works project known as the Waiakea-Uka Flood Control Project.

12. Defendant JAS. W. GLOVER, LTD., (hereinafter "Glover"), is a Hawaii corporation licensed to perform general contracting services within the State of Hawaii.

13. The lands which are the subject of this action are Hawaiian home lands at Panaewa, Hawaii, administered under the terms of the HHCA by Defendants Commission, Department, and Beamer (hereinafter State Defendants).

14. Hawaiian home lands at Panaewa have been designated by the State Defendants for agricultural farm lots for native Hawaiians eligible to lease such lands under §207(a) of the HHCA.

15. Hawaiian home agricultural farm lots in Panaewa (hereinafter "Panaewa farm lots"), are among the best farm lots in the possession of the Department at the present time.

16. Panaewa farm lots used by the County for the project include land which the State Defendants planned to lease to native Hawaiians for agricultural purposes under §207(a) of the HHCA.

17. There are over 40 eligible native Hawaiians on a waiting list for Panaewa farm lots.

18. The Waiakea-Uka Flood Control Project, (hereinafter "Project"), is located in lower Waiakea-Uka, District of South Hilo, County and State of Hawaii, and will consist upon completion of a diversion of Palai Stream into Four Mile Creek and a transmission channel designed to carry the combined flows of Palai Stream and Four Mile Creek into a water detention basin in Panaewa.

19. On March 30, 1973, the County and its consultant appeared before the Commission and presented a request for approval of the Project. The minutes of that meeting indicate that the flood control project would require approximately 12 acres of Hawaiian home lands. At this meeting the Commission voted to approve this Project "pending a 12 acre land exchange to be worked out."

20. Jas. W. Glover, Ltd. constructed Phase I of the Project under contract with the County. This contract was awarded in August, 1974 and construction began in January, 1975.

21. Phase I of the Project has been completed and extends the transmission channel in an easterly direction from Awa Street across the Panaewa farm lots. Phase II of the Project, not yet under construction, will extend the transmission channel from Awa Street in a westerly direction across other Panaewa farm lots.

22. The County is presently using 16.371 acres of the Panaewa farm lots for Phase I of the Project.

23. The County will use 3.617 acres of the Panaewa farm lots for Phase II of the Project.

24. Because the transmission channel has cut across a road reserve, an additional 5.460 acres of the Panaewa farm lots have been set aside for a new road reserve.

25. A minimum of 25.488 acres of the Panaewa farm lots will be taken by the County for the Project and will be rendered unsuitable for agricultural use by native Hawaiian beneficiaries of the HHCA.

26. State Defendents were informed by no later than May 29, 1975, that the County was using more than 12 acres of Panaewa farm land approved for exchange by the Commission.

27. State Defendants have not approved an exchange of more than 12 acres of the Panaewa farm lots for the Project.

28. Despite their knowledge that the County was using more land than was approved for exchange, State Defendants have taken no action to halt the use and alteration of the Panaewa farm lots by the County.

29. After the Commission vote, described in paragraph 19 above, State Defendants took no further action to authorize use of Hawaiian home lands for the Project until February, 1976, over six months after the initiation of this action.

30. State Defendants have received no replacement lands in exchange for the 12 acres of the Panaewa farm lots originally approved for the Project pending a land exchange, or for the additional lands actually used by the County for the Project.

31. No approval has been sought or obtained from the Governor of the State of Hawaii, or the Secretary of the

Interior for the exchange for any of the Panaewa farm lots being used for the construction of the Project.

32. There are over 1700 acres of Hawaiian home lands which are presently awaiting replacement lands through the land exchange process. From as early as 1962 until the present State Defendants have permitted much of this land to be transferred out of their control and management for the use of persons who are not beneficiaries under the HHCA without any compensation. Although such transfers were purportedly made under the land exchange provisions, §204 (4) of the HHCA, no lands have been obtained by State Defendants in exchange for lands they surrendered.

33. As of April 5, 1976, State Defendants had not determined what state lands, if any, were available from the Department of Land and Natural Resources for exchange for lands already surrendered by State Defendants for the Project or the other unconsummated land exchanges.

34. The Project was designed to alleviate flooding and to provide better drainage for portions of the City of Hilo.

35. The Project will significantly interfere with use of the Panaewa farm lots by native Hawaiians.

36. The Project was not primarily designed to serve the Panaewa Hawaiian homes farm lots although it may provide minor incidental benefits for this area.

37. The State Defendants permitted construction of the Project because they believed it was "essential to the general public", and that community benefit outweighed the detriment to the beneficiaries of the HHCA.

38. On February 2, 1976, Defendant Beamer wrote to Defendant Harada inquiring whether the County would have any objection to receiving a license for the use of Panaewa farm lots for the Project.

39. Thereafter State Defendants and Defendant County executed a license agreement on April 22, 1976 (backdated to January 1, 1976), allegedly authorizing the use of the Panaewa farm lots for the Project. This license agreement cites §207 (c) (1) of the HHCA as authority for its issuance.

40. The license agreement purports to grant to Defendant County a "flood control drainage easement". Said license provides for use for a term of 10 years, or until consummation of a land exchange. Consideration for the license is $1.00 per year.

II. DECLARATIONS AND CONCLUSIONS OF LAW

1. There are no genuine issues as to any material fact and Plaintiffs are entitled to partial summary judgment as a matter of law.

2. Sections 4 and 5 of the Hawaii Admission Act of 1959 and Article XI of the Hawaii State Constitution impose fiduciary obligations upon State Defendants who are trustees charged with executing the trust created by the HHCA for the benefit of native Hawaiians.

3. As fiduciaries, State Defendants owe the following duties to Hawaiian beneficiaries of the HHCA:

A. To exercise such care and skill in the management of the Hawaiian home lands as a person of ordinary prudence would exercise in dealing with his own property.

B. To adhere to the terms of the trust embodied in the HHCA.

C. To act exclusively in the interest of native Hawaiians, the trust beneficiaries.

D. To hold and protect the trust property for the trust beneficiaries.

4. State Defendant have breached their trust or fiduciary duties described in paragraph 3 above by: (1)

allowing the use of Hawaiian home lands under the land exchange provisions without first satisfying the prerequisites for an exchange, (2) issuing a license for an unlawful purpose, (3) permitting the uncompensated use of these lands, and (4) allowing the needs of the general public, as opposed to the needs of native Hawaiians, to control decisions made concerning the Project.

5. State Defendants may not lawfully permit Hawaiian home lands to be used for the benefit of persons who are not beneficiaries under the HHCA without first obtaining reasonable compensation for such use, when otherwise permissible, based upon sound economic and accounting principles.

6. Section 204 (4) of the HHCA permits the State Defendants

> with the approval of the governor and the Secretary of the Interior, in order to consolidate its holdings or to better effectuate the purposes of [the HHCA, to] exchange the title to available lands for lands, publicly owned, of equal value.

7. State Defendants have violated § 204 (4) by permitting Defendants County and Glover to take possession of, alter, and render unuseable for agriculture more than 24 acres of Hawaiian home lands at Panaewa, Hawaii, for the Waiakea-Uka Flood Control Project. The transfer of these lands under § 204 (4) was unlawful and invalid because:

A. State Defendants failed to make express factual findings that the land exchange proposed by Defendant County would either (1) consolidate the land holdings of the department or (2) better effectuate the purposes of the HHCA.

B. State Defendant permitted the County to use and alter over 24 acres of the Panaewa farm lots before obtaining title to public lands of equal value in exchange.

C. State Defendants failed to obtain the approval of the Governor of the State of Hawaii prior to allowing use and alteration of the Panaewa farm lots, thereby depriving native Hawaiian beneficiaries of the protection afforded by his independent review.

D. State Defendants failed to obtain the approval of the Secretary of the Interior prior to allowing use and alteration of the Panaewa farm lots, thereby depriving native Hawaiian beneficiaries of the protection afforded by his independent review.

8. State Defendants violated § 207 (c) (1) of the HHCA by issuing a license to Defendant County on April 22, 1976 (dated January 1, 1976) for the use and alteration of the Panaewa farm lots. Section 207 (c) (1) provides:

> (c) (1) The department is authorized to grant licenses for terms of not to exceed twenty-one years in each case, to public utility companies or corporations as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like. The department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, to-
>
> (A) churches, hospitals, public schools, post offices, and other improvements for public purposes;
>
> (B) theatres, garages, service stations, markets, stores, and other mercantile establishments (all of which shall be owned by lessees of the department or by organizations formed and controlled by said lessees).

9. The license of April 22, 1976, is unlawful because:

A. Licenses under § 207 (c) (1) are restricted to public utility and similar easements which do not significantly interfere with the underlying use of such lands by native Hawaiians. The Project significantly interferes with

the use of these and surrounding Hawaiian home lands by native Hawaiian beneficiaries.

B. Licenses under §207 (c) (1) (A) may be granted for public improvements only if the public improvements primarily serve native Hawaiian lessees within the district where the improvements are located. The Project does not primarily serve native Hawaiian beneficiaries in this district.

10. Licenses under §205 (2) of the HHCA can not be granted for the Project because that section does not permit the licensing of Hawaiian home lands which are required for leasing to native Hawaiians under §207 (a) of the HHCA. Since these lands were planned for leasing to native Hawaiians, they could not be licensed to the County. In addition, licenses under §204 (2) may only be issued to the "general public, including native Hawaiians." The County is not a member of the general public and does not qualify for a lease or license under §204 (2).

11. Because no land exchange has been properly consummated and the purported license is unlawful, Defendant County, through Defendant Glover, has unlawfully taken possession of, used, and altered in excess of 24 acres of Hawaiian home lands at Panaewa, Hawaii.

III. ORDER

IT IS ORDERED that Defendants Commission, Department, Beamer, County, Harada and Glover and their agents, employees or successors in office or any persons in active concert or participation with them who receive actual notice of this order are hereby enjoined from using the Waiakea-Uka Flood Control Project until a program or schedule is submitted to this Court and approved, pursuant to this order set forth below.

IT IS FURTHER ORDERED that the State Defendants complete a land exchange as soon as reasonably possible in compliance with §204 (4) of the HHCA to obtain suitable replacement lands on the Island of Hawaii for the Hawaiian home lands rendered unsuitable for agriculture by the Waiakea-Uka Flood Control Project. State Defendants shall submit to this Court and to Plaintiffs' attorneys within 30 days after the effective date of this order a proposed schedule setting forth the steps required to complete the land exchange process and the manner and dates by which each step will be accomplished; provided, however, that such schedules shall be subject to review and revision by this Court, if inadequate.

IT IS FURTHER ORDERED that this Court shall retain jurisdiction over this matter until a land exchange is fully and properly consummated.

DATED: Honolulu, Hawaii, _____, 1977

_____

JUDGE OF THE ABOVE-ENTITLED COURT

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1044

KEAUKAHA-PANAEWA COMMUNITY
ASSOCIATION, ET AL.,

Plaintiffs-Appellees

v.

HAWAIIAN HOMES COMMISSION, ET AL.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF OF THE UNITED STATES, *AMICUS CURIAE*

OPINION BELOW

The unreported "Finding of Fact; Declarations and Conclusions of Law; Order" by District Judge Dick Yin Wong appears at pages 551-555 of the reproduced record.

JURISDICTION

The final order of the district court was entered September 1, 1976 (R. 561). This Court's jurisdiction rests on 28 U.S.C. 1291.

QUESTIONS PRESENTED

1. Whether an association which represents Native Hawaiian beneficiaries under the Hawaiian Homes Commission Act and individual native Hawaiians have standing or a right to bring an action to enforce provisions of that Act or the Hawaii Admision Act in United States District Court under 28 U.S.C. 1331.[1]

2. Whether the United States alone is authorized to bring an action to enforce compliance with provisions of the Hawaiian Homes Commission Act or the Hawaii Admission Act.

STATEMENT

This brief is submitted by the United States in response to the order of this Court, dated April 21, 1978, requesting the Department of Justice to file "a brief as *amicus curiae* on the jurisdictional aspects of the case."

The district court below has concluded that the Hawaiian Homes Commission Act (HHCA) is "a Federal law, a State law and also the substance of a compact between the United States and the State of Hawaii" (footnote omitted; R. 203). This was also the ruling of the District Court of the District of Hawaii (Pence, J.) in *Kila v. Hawaiian Homes Commission*, Civ. No. 74-12 (Sept. 17, 1974, unreported, R. 70).

The HHCA of 1920 was first enacted as a law of the United States on July 9, 1921, 42 Stat. 108. This act was codified to the United States Code under Title 48 Section 691 to 716. The United States, in providing for the admission of the State of Hawaii into the Union, P.L. 86-3, 73 Stat. 4, March 18, 1959, provided in Section 4 of the Admission Act that Hawaii, as a condition to obtaining

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[1] We have assumed that the Court in its order of April 21, 1978, inadvertently asked for our views on the standing or right of "appellants" to bring this action and intended for our brief to address the appellees' standing or right.

statehood, enter into a compact with the United States relating to the management and disposition of the Hawaiian home lands. This Act provides that " * * * the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State * * *," 73 Stat. 5. In Section 5, subsections (a)-(e) of the same Act, the United States, with certain exceptions not here relevant, granted to the State of Hawaii title to all public lands and other public property held by the United States immediately prior to the State of Hawaii's admission into the Union. Section 5 (f) of the Act, 73 Stat. 6, provided that "such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians * * *, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use." Section 5 (f) continued: "Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States."

The State of Hawaii, in its Constitution, Article XI, Section 1, adopted "as a law of the state," the Hawaiian Homes Commission Act of 1920. Section 2 of Article XI of the Constitution is the compact with the United States which was validated by the ratification by the people of the State of Hawaii in adopting their constitution. Subsequently, Title 48 U.S.C. 691-716 dealing with Hawaiian Homes Lands was omitted from the United States Code, but the HHCA has never been formally repealed.

VIEWS OF THE UNITED STATES

1. *The Hawaiian Homes Commission Act is a law of the State of Hawaii and is no longer a federal law.* - The United States does not believe the HHCA, which Congress required the State of Hawaii to adopt as part of the law of that State upon admission, is presently a federal law.

The United States, upon the admission of Hawaii as a state, turned over to the new state the public lands, with certain exceptions not relevant here, to which it formerly held title. These lands were to be administered by the State under the HHCA which had been adopted by its constitution as a "law of the State." The intent of the United States that these lands be held and administered by the State of Hawaii under the HHCA is, we believe, clear. The principal restriction retained by the United States, set forth in Section 4 of the Admission Act, provides that the essential purposes of the HHCA may not be changed without the consent of the United States. 73 Stat. 5. Significantly, Section 7 (b) (3) of the Statehood Act provided that "all provisions of the [Statehood] Act of Congress approved [on the approval date] reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people." 73 Stat. 7.

Certainly the HHCA became a law of the state of Hawaii upon the completion of the compact which the State was required to enter into with the United States as an condition to obtaining statehood. If this Act were still a federal law, there would have been no need to have obtained the consent of the State and its people to the reservation of certain residual rights relating to the manner

that parts of the HHCA may be amended or repealed as set forth in Section 1 of Article XI of the Hawaiian Constitution.

To our knowledge, the Federal Government has taken no action in this area of State concern since this Act became a State law and we know of no intent to retain the HHCA as a federal statute and no federal purpose to be served in having the HHCA regarded as a federal law.[2]

2. *The fact that the HHCA was required to be "adopted as a law of the state," as a compact with the United States, does not operate to make the HHCA a federal law.* - Section 4 of the Hawaii Statehood Act, Pub. L. 86-3, 73 Stat. 4, provided in pertinent part:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said state * * *.

The State did enter into the required compact with the United States. See Article XI of the Hawaii State Constitution, Titles 1-4 of 1 Haw. Rev. Stats.; and Proc. 3309, August 21, 1959, 24 F.R. 6868, 73 Stat. c74, admitting the state of Hawaii into the Union.

The fact that the HHCA was required to be enacted into state law by the Hawaiian Admission Act, and was adopted by the State, does not operate to make this act a federal law any more than would Section 3 of the Hawaiian Admission Act, which required that the State Constitution always be republican in form, make the State Constitution a federal law. Had Congress intended the HHCA to remain a federal law it certainly could have so provided. What it did, however, was to have the HHCA adopted as a State law, permitting the State to manage and dispose of the lands granted by the United States to the State by Section 5, subsections (a)-(e) of the Admission Act " * * * in such manner as the constitution and laws of said State may provide * * *."[3]

The state entered into the compact with the United States as required by the Admission Act. The compact was completed; and nothing remains to be done. The compact is not in issue and the present action does not raise any questions concerning it.

3. *Hawaiian Natives can properly bring suit in federal court to enforce the trust provisions of Section 5 (f) of the Hawaii Admission Act.* - In response to the second issue posed by this Court, we believe that there is presented here a federal question. Native Hawaiians can properly bring suit in the United States District Court under 28 U.S.C. 1331 (a) to enforce the provisions of the Hawaii Admission Act, 73 Stat. 4, which is a law of the United States.

The Hawaii Admission Act, Section 5(f) provides that the lands, proceeds, and income granted to the State under that Act shall

> be managed and disposed of for one or more of the foregoing purposes *in such manner as the constitu-*

[2]Stated differently, the provisions of the Admission Act and the adoption of the State Constitution ended federal administration of the HHCA. The pertinent provisions of the HHCA have since been administered by the State and Congress has not evinced any intent to the contrary.

[3]Under the circumstances, this congressional direction is at least an expression of implied intent that the HHCA itself was no longer to be considered a federal law.

tion and laws of said state may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. [Emphasis added.]

Since the State of Hawaii holds the lands conveyed to it by the United States for the benefit of the Native Hawaiians, they, as beneficiaries of that trust, would seem to be entitled to bring suit in the United States District Court to compel the State to fulfill the terms of the trust. Obviously, beneficiaries under a trust have standing to maintain an action to protect the trust or to compel administration of the trust intended by its creation and purpose. See *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), which we believe is analogous.[4]

The Admission Act, in our opinion, is clearly a federal law. It specifies the purposes of the transfer of property and the restricted uses of lands and income for the benefit of Native Hawaiians. Under these circumstances, our view is that Native Hawaiians may maintain a suit in federal court to enforce the purposes of the trust as expressed in the Admission Act and that there is "federal question" jurisdiction.

4. *The United States could have properly maintained a suit in federal district court for a breach of any of the trust duties specified in Section 5 (f) of the Hawaii Admission Act, 73 Stat. 4.* - Section 5 (f) of the Admission Act, quoted above, clearly authorizes the United States

[4]Cf. *Capitan Grande Band of Mis. Indians v. Helix Irr. Dist.*, 514 F.2d 465, 470-71 (C.A. 9, 1975), cert. den., 423 U.S. 874; *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1107 (C.A. 10, 1976), cert. den., 429 U.S. 1121.

to file suit to enforce the State's responsibilities with respect to the Hawaiian trust lands.

The Hawaii Admission Act, 73 Stat. 4, is unquestionably a federal law. A suit to enforce a provision of that Act would be a suit arising under a law of the United States within the meaning of 28 U.S.C. 1331, and, if commenced by the United States, jurisdiction would be in the federal district court. 28 U.S.C. 1345.

CONCLUSION

We believe that the district court incorrectly found the HHCA to be a federal law. However, we believe that the district court did have jurisdiction over this matter under 28 U.S.C. 1331 (a) to enforce Section 5 (f) of the Hawaii Admission Act. That law specifies that the lands conveyed by the United States to the State are to be managed and disposed of for certain stated purposes. Clearly, the United States could have filed suit to enforce this trust as the statute explicitly states. In addition, the Hawaiian beneficiaries could also properly bring an action to enforce this trust.

Respectully submitted,

Sanford Sagalkin,
Acting Assistant Attorney General.

Jacques B. Gelin,
George R. Hyde,
Attorneys, Department of Justice,
Washington, D.C. 20530.

May 1978
90-1-0-1208

APPENDIX D

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, Keaukaha-Panaewa Farmers Association, Isabel Leinani Knutson, Erma Kalanui and April Kamakaokalanimalunao'e Kalanui, by her guardian ad litem, Erma Kalanui, Individually and on behalf of all persons similarly situated, Plaintiffs-Appellees,

v.

HAWAIIAN HOMES COMMISSION, Billie Beamer, in her capacity as Chairman of the Hawaiian Homes Commission, the Department of Hawaiian Home Lands, Defendants-Appellants,

and

County of Hawaii, Edward Harada, in his capacity as Chief Engineer, County of Hawaii, Defendants,

and

James W. Glover, LTD., a Hawaii Corporation, Defendant

No. 77-1044

United States Court of Appeals, Ninth Circuit.

Sept. 18, 1978.

As Amended on Denial of Rehearing and Rehearing En Banc Jan. 9, 1979.

Before CHAMBERS, WALLACE, and ANDERSON, Circuit Judges.

WALLACE, Circuit Judge:

Agencies of the State of Hawaii appeal from a judgment of the district court that the agencies have violated their obligations in connection with certain lands held in trust by the State of Hawaii for the benefit of native Hawaiians. This appeal raises complex jurisdictional and jurisdiction-related issues. We reverse.

I

In 1921, Congress enacted the Hawaiian Homes Commission Act (Commission Act), 42 Stat. 108, which created the Hawaiian Homes Commission (Commission) and designated some 200,000 acres (the Hawaiian home lands) for the welfare and rehabilitation of native Hawaiians. The Commission Act empowers the Commission to lease parcels of land within its jurisdiction to native Hawaiians at nominal rates. Although the underlying purpose of the statute has been questioned, it was ostensibly designed to rehabilitate the declining indigenous Hawaiians by facilitating their access to farm and homestead lands. *See* Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 865-66, 876-80 (1975).

With the admission of Hawaii into the Union in 1959, responsibility for the administration of the Hawaiian home lands was transferred to the state. Section 4 of the Hawaii Admission Act, Pub.L. No. 86-3, 73 Stat. 5 (1959) provides:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State

In addition, the Admission Act conveyed the United States' title to the Hawaiian home lands to the state, *id.*

at § 5(b),[1] and requires Hawaii to hold these lands "as a public trust . . . for the betterment of the conditions of native Hawaiians . . . and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. *Id.* at § 5(f).[2]

In accordance with section 4 of the Admission Act, the Commission Act was adopted as a provision of Hawaii's constitution, Hawaii Const. art. XI, and was thereafter deleted from the United States Code, although it was not formally repealed.

In the early 1970s, the County of Hawaii proposed the construction of a flood-control project in the Waiakea-Uka area. Because the proposed project was to be constructed on approximately 12 acres of Hawaiian home lands, the County presented its proposal to the Commission. The Commission apparently concluded that the project would alleviate flood problems experienced by some of its lessees in the Panaewa area and accordingly approved

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[1] Section 5(b) provides:

> Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

[2] Section 5(f) provides:

> The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United

[footnote continued]

the project. On this basis, the Commission agreed to convey the 12 acres of affected home lands to the County in exchange for equivalent acregage of county land.[3]

In January 1975, construction began on the proposed flood-control project. Shortly thereafter the County determined that the survey on which the project was based was inaccurate and that as a result an additional 5.5 acres of home lands would be required. It is now undisputed

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> States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educations institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

This provision contains an ambiguity since it arguably provides that the Hawaiian home lands may be used for the same general public purposes as other federal lands conveyed to Hawaii pursuant to the Admission Act. For purposes of this case, however, we accept as true plaintiffs' assertion that the home lands may still lawfully be used only in the manner set forth in the Commission Act.

[3] In 1954 Congress amended section 204(4) of the Commission Act to permit the Commission, under certain circumstances,

[footnote continued]

that the entire project, if completed, will require approximately 25.5 acres of Hawaiian home lands. It is also undisputed that no lands have been exchanged in order to compensate the Commission for the home lands used in the project.

In July 1975, a group of native Hawaiians (plaintiffs) brought this action against the Commission, the County, and various individuals involved with the construction of the Waiakea-Uka Project, seeking declaratory and injunctive relief. The plaintiffs are all lessees of Hawaiian home lands in the Panaewa area or are qualified applicants for such leases.

Plaintiffs asserted five distinct claims each of which is premised on either the Admission Act or the Commission Act. First, plaintiffs claim that the Commission has violated section 204(4) of the Commission Act by agreeing to exchange lands for a purpose other than those permitted by the Act.[4] Second, plaintiffs claim that the Commission has violated section 204(4) by permitting the County to render home lands useless for their designated purpose without first receiving title to lands

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to exchange property within its jurisdiction for lands of equal value. Section 204(4) reads in part:

> The Commission may, with the approval of the Governor and the Secretary of the Interior, in order to consolidate its holdings or to better effectutate the purposes of this Act, exchange the title to available lands for land, publicly owned, of an equal value.

Act of June 18, 1954, ch. 319, 68 Stat. 262 (1954).

[4]Section 204(4), by its terms, only permits land exchanges designed "to consolidate [the Commission's] holdings or to better effectuate the purposes of th[e] Act . . . ." *See* note 3, *supra.*

Plaintiffs assert that an exchange of lands to make possible the project, which is designed primarily to serve the City of Hilo, furthers neither of the permissible goals.

received in compensation. Third, plaintiffs claim that the Commission violated section 204(4) by failing to obtain the consent of the Governor and Secretary of Interior for the proposed exchange. Fourth, plaintiffs allege that the project is "illegal" because it will consume twice the amount of home lands originally approved by the Commission.[5] Finally, plaintiffs claim that the Commission has violated fiduciary obligations imposed upon it by sections 4 and 5 of the Admission Act.

The Commission moved to dismiss the action on the ground that it does not "arise under the Constitution, laws or treaties of the United States." *See* 28 U.S.C. § 1331(a); U.S. Const. art III, § 2. The district judge denied the motion and held that because both the Commission Act and the Admission Act are federal statutes, federal question jurisdiction would exist as to each claim.

In September 1976, the district judge granted plaintiffs' motion for summary judgment on their second, third, fourth and fifth claims. The district judge ordered the Commission and the other defendants to "complete a land exchange as soon as reasonably possible in compliance with § 204(4)" of the Commission Act. The defendants were also enjoined from "using" the Waiakea-Uka Flood Control Project until the district court had approved a land exchange schedule.

On appeal, the Commission renews its jurisdictional arguments and also attacks the merits of the district court's ruling. Because of the unique and substantial nature of

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[5]Plaintiffs' general assertion that the project is "illegal" makes precise jurisdictional analysis very difficult. We think it clear from the entire complaint, however, that this claim too was premised on the Commission Act and the Admission Act. Therefore, the "federal question" and "cause of action" analysis in the subsequent text are fully applicable to this claim.

the jurisdictional questions, we requested the Department of Justice to present its views as amicus curiae.

The problem which the parties and amicus have treated under the general heading of jurisdiction really involves two discrete issues: whether there exists (1) a private cause of action, and (2) federal question jurisdiction. The Supreme Court recently explained the distinct nature of these separate inquiries in *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974) (*Amtrak*):

> In this Court and in the Court of Appeals, the parties have approached the question from several perspectives. The issue has been variously stated to be whether the Amtrak Act can be read to create a private right of action to enforce compliance with its provisions; whether a federal district court has jurisdiction under the terms of the Act to entertain such a suit; and whether the respondent has standing to bring such a suit. . . . [T]he threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party . . . can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court has jurisdiction to entertain it.
>
> [T]he threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private part . . . can enforce duties and obligations imposed by the Act; for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it.

Id. at 455-56, 94 S.Ct. at 692.

[1] Based upon *Amtrak*, therefore, our threshold inquiry is whether the Commission Act and the Admission Act create private causes of action for enforcement of their terms. Only if such a right of action exits need we determine whether the district court had jurisdiction. We hold that the Admission Act does not provide a private right of action and we therefore do not reach the jurisdictional issue as to the Admission Act claims. We do consider this subsequent issue as regards the claims alleged to arise under the Commission Act, but conclude that the district court was without jurisdiction. We therefore reverse.

II

We turn first to plaintiffs' claims which are based on the trust language of sections 4 and 5 of the Admission Act. Section 5 expressly provides that the improper use of Hawaiian home lands "shall constitute a breach of trust for which suit may be brought by the United States." The Act is silent, however, on the question of whether suit may be brought by a private individual to enforce its terms. Thus, the threshold question is squarely presented: Does the Admission Act create an implied cause of action by which a private party may enforce the duties and obligations imposed by the Act? The Supreme Court has recently decided a series of cases which guide us to the proper resolution of this question.

A

In *Amtrak, supra*, 414, U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646, an association of railroad passengers challenged the discontinuance of certain passenger lines as violative of the Rail Passenger Service Act. In reaching its

conclusion that the Act does not imply a private cause of action of this type, the Court focused principally on the fact that the Act specifically permits enforcement suits by the Attorney General or, in cases involving a labor agreement, by employees. It was argued that the authorization of the public cause of action and the very narrow private right of action "should not be read to *preclude* other private casues of action for the enforcement of obligations imposed by the Act." *Id.* at 457, 94 S.Ct. at 693. Since the action was brought by the intended beneficiaries of the Act, it was contended that the Court should therefore imply a private cause of action in their favor. The Court disagreed, reasoning

> that when legislation expressly provides a particular remedy or remedies, court should not expand the coverage of the statute to subsume other remedies. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." This principle of statutory construction reflects an ancient maxim—*expressio unius est exclusio alterius*. Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act.

Id. at 458, 94 S.Ct. at 693 (citation omitted).

[2] Although the Court carefully stated that the *expressio unius* principle would "yield to clear contrary evidence of legislative intent," *id.* at 458, 94 S.Ct. at 693, *Amtrak* clearly indicates that in cases where a statute provides only for a public or very narrow private cause of action, there is at least a rebuttable presumption that the

legislature did not intend to grant a general, private enforcement cause of action. *See Giraraier v. Webster College*, 563 F.2d 1267, 1276-77 (8th Cir. 1977); *Olsen v. Shell Oil Co.*, 561 F.2d 1178, 1184 n.5 (5th Cir. 1977), *Cannon v. University of Chicago*, 559 F.2d 1063, 1074 & n.14 (7th Cir. 1976), *cert. granted*, ___ U.S. ___, 98 S.Ct. 3142, 57 L.Ed.2d 1159 (1978); *Goldman v. First Fed. Savings & Loan*, 518 F.2d 1247, 1250 n.6 (7th Cir. 1975); Note, *Implied Private Actions Under Federal Statutes – The Emergence of a Conservative Doctrine*, 18 Wm. & Mary L. Rev. 429, 438 (1976).

In addition to the *expressio unius* and legislative intent criteria, the Court in *Amtrak* also stated that the implication of a private cause of action "must be consistent . . . with the effectuation of the purposes intended to be served by the Act." *Amtrak, supra*, 414 U.S. at 458, 94 S.Ct. at 693.

In *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) (SIPC), the Court reaffirmed the analysis it had recently adopted in *Amtrak*. In *SIPC*, the Court framed the issue as whether customers of a financially troubled securities broker "have an implied private right of action under the Securities Investor Protection Act of 1970" to compel the Securities Investor Protection Corporation "to exercise its statutory authority for their benefit." *Id.* at 413-14, 95 S.Ct. at 1735. The Act expressly provided for such enforcement actions by the SEC.

The Court held that the Act did not imply a private cause of action for enforcement of its terms. In reaching its decision, the Court relied almost exclusively on *Amtrak*. Most significantly, the Court reaffirmed that the express provision for a public cause of action "ordi-

narily implies that no other means of enforcement was intended by the Legislature." *Id.* at 419, 95 S.Ct. at 1738.

Reemphasizing the additional criteria it had used in *Amtrak*, the Court also explained that the inference drawn from the structure of the Act would yield to clear extrinsic evidence that Congress intended a private cause of action and that any implied right of action must be compatible with the scheme and purpose of the Act. *Id.* at 420-21, 95 S.Ct. 1733.

In *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Court considered "whether a private cause of action [was] to be implied in favor of a corporate stockholder under 18 U.S.C. § 610, a criminal statute prohibiting corporations from making 'a contribution or expenditure in connection with any election at which Presidental and Vice Presidental Electors . . . are to be voted for.' " *Id.* at 68, 95 S.Ct. at 2083. In concluding that such a private right of action was not implied, the Court identified four "factors" to be examined in determining whether implication of a private right of action is appropriate.

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . .—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e.g.*, *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458, 460, 94 S.Ct. 690, 693, 694, 38 L.Ed.2d 646 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally,

> is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action solely on federal law?

Id. at 78, 95 S.Ct. at 2088 (citations omitted).

This formulation is superficially in accord with *Amtrak* and *SIPC*. The citation to *Amtrak* following the second criterion suggests that the *expressio unius* inference is an acceptable manner of ascertaining "implicit" legislative intent. In a footnote, however, the Court left uncertain the vitality of the *expressio unius* inference approved in *Amtrak* and *SIPC*.

In *Cort*, it was argued that the Federal Election Campaign Act of 1971 had created private remedies for violations of its disclosure provisions and had amended section 610 without providing a parallel private remedy. Thus, it was contended, *Amtrak* required the inference of legislative intent not to provide a remedy for section 610. The Court rejected this argument, distinguishing *Amtrak* primarily on the ground that in *Amtrak* "there was specific support in the legislative history of the Amtrak Act for the proposition that the statutory remedies were to be exclusive." *Id.* at 82-83 n.14, 95 S.Ct. at 2090. Thus, *Cort* suggests that the *expresio unius* inference is only permissible when supported by legislative history. This suggestion, however, apparently conflicts with *Amtrak's* teaching that this inference is operative *unless* contradicted by "clear contrary evidence of legislative intent." *Amtrak*, *supra*, 414 U.S. at 458, 94 S.Ct. at 693.

[3,4] Although *Cort* may be read as rejecting the *Amtrak* approach, *see* Note, *Implied Private Actions Under Federal Statutes–The Emergence of a Conservative Doctrine*, 18 Wm. & Mary L.Rev. 429, 453 (1976), we

believe *Amtrak* remains important for our analysis of the case before us. First, the Court distinguished *Amtrak* rather than reject it. Therefore, in cases which do not share the same bases for distinction, *Amtrak* remains a controlling precedent. Second, we are guided by the fact that other circuits have continued after *Cort* to afford some, albeit differing, weight to the *Amtrak* approach. *See Girardier v. Webster College, supra,* 563 F.2d at 1276-77 (where enforcement of statute is entrusted to Secretary of HEW, "no private cause of action arises by inference"); *Olsen v. Shell Oil Co., supra,* 561 F.2d at 1188 (*Amtrak* "modif[ied] . . . somewhat" by *Cort*). In short, we agree with the conclusion of the Seventh Circuit in *Cannon v. University of Chicago, supra,* 559 F.2d 1063.

> The teaching of *Amtrak, SIPC* and *Cort, supra,* is that a private cause of action should not be lightly implied under a statute where Congress has not specifically provided one—especially where Congress has provided for other means of enforcement.

Id. at 1074 (footnote omitted).[6] Whatever the impact of *Cort* may be, the *Amtrak* inference is at least one factor which, in appropriate cases, may properly go into the crucible for resolving the implication issue.

B

[5] The first of the *Cort* criteria is that the plaintiff must be a member of the "class for whose *especial*

[6] Apparently, our court has employed the *Cort* test three times in determining whether a certain statute implies a private right of action. *See Starbuck v. City & County of San Francisco,* 556 F.2d 450 (9th Cir. 1977); *Kipperman v. Academy Life Ins. Co.,* 554 F.2d 377 (9th Cir. 1977); *Harmsen v. Smith,* 542 F.2d 496 (9th Cir. 1976). In none of these case, however, were we required to consider the impact of *Cort* on the *Amtrak* approach.

benefit the statute was enacted . . . ." 422 U.S. at 78, 95 S.Ct. at 2088. Of course, the trust provision of section 5(f) of the Admission Act pertains to all public Hawaiian land and not just to the home lands. In that sense, the provision does not benefit any class narrower than all citizens of Hawaii. It is clear, however, that the home lands were to continue to be used for the benefit of native Hawaiians as defined by the Commission Act. Therefore, the trust provision, as applied to the home lands, is intended especially to benefit native Hawaiians. Since plaintiffs are clearly members of this group, the first element of the *Cort* test is satisfied.

The second element of the *Cort* test, "explicit or implicit" legislative intent, cuts against implication of a private cause of action here. Our review of the legislative history of the Admission Act, *see* S.Rep. No. 80, 86th Cong., 1st Sess., Appendix C (1959) *reprinted in* [1959] U.S. Code Cong. & Admin. News, pp. 1346, 1403, has not discovered any indication that Congress intended to create a private cause of action via the Admission Act nor has any such indication been pointed out to us. Indeed, the rare references in the Committee reports to enforcement of section 5's trust provisions refer exclusively to the public cause of action. *See, e.g.,* S.Rep. No. 1164, 85th Cong., 1st Sess. 14 (1957). This does not surprise us, however. It would be unusual for Congress to employ a state's admission act to create private enforcement rights, and it is inconceivable that Congress would intend to do so implicitly.

At this point, of course, the *Amtrak* presumption enters our analysis. Although the uncertainties of the *Cort* decision counsel against heavy reliance on this presumption, as we explained above, it remains *a* relevant factor in cases such as this. We think the particu-

lar history of the Admission Act renders it most appropriate for application of the *expressio unius* presumption:

> The first Hawaii statehood bill was introduced in the 65th Congress in 1919. Hearings began 25 years ago with those on H.R. 3034, 74th Congress.
>
> Since then, the House and Senate have held 22 additional hearings on the subject of statehood for Hawaii. The record on the question comprises more than 6,600 printed pages of testimony and exhibits. More than 850 witnesses have been heard in the Territory and in Washington. Seven of the hearings have been held in Hawaii (1935, 1937, 1946, 1948, 1954, and 1958). In addition, at least 12 reports have been made.
>
> The question of admitting Hawaii to statehood has been longer considered and more thoroughly studied than any other statehood proposal that has ever come before Congress. Thirty-seven States have previously been admitted to the Union by action of Congress, yet in no single case has there been such a thoroughly careful study of the qualifications of the applicant as in the case of Hawaii.

S.Rep.No. 80, 86th Cong., 1st Sess. (1959), *reprinted* in [1959] U.S.Code Cong. & Admin. News, pp. 1346-50.

[6] The *expressio unius* principle is based on a presumption that by providing a specific remedy, Congress intended to exclude others. Reason dictates that the more thoroughly a bill is considered, the greater the likelihood that the *expressio unius* presumption accurately reflects reality. Since in this case, the legislative measure was given protracted consideration, it is more likely that the lack of an express private cause of action was intentional. Given this consideration, and finding no contrary evidence, the express provision for the public cause

of action permits us, on authority of *Amtrak* and *SIPC*, to infer that Congress did to intent to create a private right of action.

[7,8] The third of the *Cort* elements is that an implied cause of action must be consonant with the general scheme and purposes of the statute. Although this is a close question in this case, we think this criterion tends to militate against implication. Clearly, the Admission Act was intended to transfer complete ownership and responsibility of the Commission Act program and the home lands to Hawaii. Since, as this case demonstrates, disputes pertaining to this program involve purely Hawaiian officials, citizens, and lands, we see no federal purpose to be served by reading a private cause of action into the Admission Act. Absent a Federal constitutional violation, we rely upon the laws and institutions of Hawaii to protect its native citizens and assure the proper use of state-owned lands, subject only to the public enforcement right expressly contained in the Act.

Turning to the final *Cort* criterion, we easily conclude that the cause of action at issue here is "one traditionally relegated to state law, in an area basically the concern of [Hawaii] . . . ." 422 U.S. at 78, 95 S.Ct. at 2088. With Hawaii's admission into the Union, the national government virtually relinquished its control over and interest in the Hawaiian home lands. The problem described in plaintiffs' complaint is essentially a matter of state concern. We deem it most appropriate for Hawaii's laws and judicial system to deal with it.

These factors concertedly and decidedly militate against implication of the private enforcement cause of

action. Therefore, plaintiffs' Admission Act claims must be dismissed.[7]

III

Plaintiffs' claims which are premised on the Commission Act raise the same problems as do their Admission Act claims; the Commission Act similarly does not expressly provide for a private right of action to enforce its terms. However, we choose not to confront this difficult question because even assuming a private right of action, a suit based upon the Commission Act claims faces a

[7] Plaintiffs contend that, as native Hawaiians, they should receive the benefit of cases that have allowed native Americans (American Indians) a private federal right of action where the United States, as trustee, could sue in federal district court to protect the native Americans' rights with regard to trust lands. *See, e.g., Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186 (9th Cir. 1971), *cert. denied*, 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 890 (1972). We developed this "co-plaintiff" doctrine in reliance upon *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 366-72, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968), which held that "[a]n Indian, as the beneficial owner of lands *held by the United States in trust* has a right acting independently of the United States to sue to protect his property interests." *Agua Caliente Band of Mission Indians v. County of Riverside, supra*, 442 F.2d at 1186 (emphasis added) (footnote omitted).

The argument in favor of a private right of action in federal court pursuant to the "co-plaintiff" doctrine is of less force in the situation before us. The factual circumstances underlying the line of cases establishing this doctrine generally involve native Americans, as plaintiffs, suing a state or other entity to protect their rights in trust property, where the United States is trustee of the lands. In this case, however, the state is the trustee, the native Hawaiians are attempting to sue the state for breach of the state's trust obligations, and the United States has the opportunity to sue the state only on the basis of a right reserved by Congress in the state's Admission Act. The United States has only a somewhat tangential supervisory role under the Admission Act, rather than the role of trustee.

discrete and equally lethal potential obstacle: federal subject matter jurisdiction. We conclude that the district court was without jurisdiction to hear these claims; we therefore reverse.[8]

Plaintiffs argue that the district court had subject matter jurisdiction over the Commission Act claims pursuant to 28 U.S.C. § 1331(a). Section 1331(a) provides in part:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution, laws, or treaties of the United States. . . .

The crucial question here, of course, is whether plaintiffs' Commission Act claims "arise under" the laws of the United States.

The issue of whether or not a particular case arises under federal law is perhaps "the most difficult single problem in determining whether the federal jurisdiction exists." *Smith v. Grimm*, 534 F.2d 1346, 1350 (9th Cir.), *cert. denied*, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976), *quoting* C. Wright, A. Miller, & E. Cooper, 13 Federal Practice & Procedure 397 (1975). Although the Supreme Court has rendered several rele-

[8] Although the Supreme Court in *Amtrak* did refer to the implication issue as "the threshold question," 414 U.S. at 456, 94 S.Ct. 690, we think it preferable to reach first the jurisdictional issue with respect to the Commission Act claims. First, the jurisdictional issue is also a threshold one in that it too *must* be satisfied before we can proceed to the merits. More important, because we are without jurisdiction, it would be unwise needlessly to express an opinion on a difficult question—whether the Commission Act implies a private right of action—which may ultimately be presented in the proper forum, a state court.

vant decisions,[9] these cases do not fit snugly into a single, logical mosaic.

Beginning with *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 6 L.Ed. 204 (1824), the courts have endeavored, from time to time, to develop an all-encompassing rule to be applied to determine if a case arises under federal law. Chief Justice Marshall looked to whether the federal law is the "original ingredient" of the action. *Id.* at 824. Perhaps the next most famous was Mr. Justice Holmes' formulation that "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916).

None of the definitions found seem to have universal application. Perhaps the most thoughtful distillation was developed by Professor Paul Mishkin when he concluded that original federal jurisdiction requires "a substantial claim founded 'directly' upon federal law." Mishkin, *The Federal "Question" in the District Courts*, 53 Col.L.Rev. 157, 165, 168 (1953).

Fortunately, however, it is unnecessary for us to go beyond the facts of this case. In *Gully v. First Nat'l Bank*, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936), the Supreme Court comprehensively reviewed its prior decisions and provided an analysis which is determinative of the case before us.

In *Gully*, a state tax collector brought suit in state court to collect a state tax levied against a national bank. The bank removed the case to federal court. On appeal,

[9] *See* C. Wright, A. Miller & E. Cooper, 13 Federal Practice and Procedure § 3562 (1975); Mishkin, *The Federal "Question" in the District Courts*, 53 Col.L.Rev. 157 (1953); Cohen, *The Broken Compass: The Requirement That A Case Arise "Directly" Under Federal Law*, 115 U.Pa.L.Rev. 890 (1967).

the Fifth Circuit upheld the district court's assertion of jurisdiction "upon the ground that the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute . . . ." *Id.* at 112, 57 S.Ct. at 97.

The Supreme Court reversed. Mr. Justice Cardozo, writing for a unanimous court, analyzed the problem as follows:

> Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the federal statute consenting, subject to restrictions, that such assessments may be made. . . . If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.
>
> . . . We recur to the test announced in *Puerto Rico v. Russell & Co., supra:* "The federal nature of the right to be established is decisive—not the source of the authority to establish it." Here the right to be established is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far.

Id. at 115-16, 57 S.Ct. at 99 (citations omitted).

In the case before us, plaintiffs argue that the Commission Act created the rights which they seek to vindicate and, since the Act was never formally repealed by Congress, these claims arise under a federal law. Although this argument bears a degree of logical and technical appeal, we think it ignores the practical realities of the situation. Its adoption would require us to reject Mr. Justice Cardozo's counsel:

> To define broadly and in the abstract "a case arising under the Constitution or laws of the United States" has hazards of a kindred order. What is needed is something of that *common-sense* accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end. . . . Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have *their source or their operative limits in the provisions of a federal statute* or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.[10]

[10]This statement has been criticized as an inadequate test so long as the court will only look at the complaint in making its determination. Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U.Pa.L.Rev. 639, 670-71 (1942).

Id. at 117-18, 57 S.Ct. at 100 (citations omitted; emphasis added). We have followed Mr. Justice Cardozo's "common-sense" admonition. *See League to Save Lake Tahoe v. B.J.K. Corp.*, 547 F.2d 1072, 1074 (9th Cir. 1976).

[9-11] The Commission Act, as originally enacted, created certain benefits for native Hawaiians. It is clear, however, that for all practical purposes these benefits have lost their federal *nature*. Upon admission of Hawaii into the Union, the entire Commission Act program was turned over to the State of Hawaii. The United States conveyed its interest in the home lands (which are the subject of the Commission Act) to the state and these lands are now administered by state officials. The Commission Act itself was deleted from the United States Code and, at Congress' insistence, was adopted as a permanent fixture of the state's constitution. Thus, it is undisputable that the Commission Act program together with its rights and duties are, for all practical purposes, elements of Hawaiian law.[11] In essence, this is an action

[11]We acknowledge the argument that if the Commission Act is still also federal law, there may exist two independent sources for plaintiffs' claims, one state and the other federal. There, the argument goes, since plaintiffs may determine on which law they base their claims, *Bell v. Hood*, 327 U.S. 678, 681, 66 S.Ct. 773, 90 L.Ed. 939 (1946), their reliance upon the federal statute confers "federal question" jurisdiction.

It is clear, however, that even though a federal statute expressly grants a specific right of action, the case will not necessarily be deemed to arise under federal law if the resolution of the case will depend wholly on issues of state law. *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 20 S.Ct. 726, 44 L.Ed. 864 (1900). In addition, even assuming that plaintiffs' claims have a federal *source*, it is the state *nature* of the claims which, as we explain in the text, resolves the jurisdictional issue. If we were to hold that the Commission Act claims arise under federal law solely because

[footnote continued]

brought against state officers to compel them to administer state lands in conformance with the state constitution. These facts make it clear that the rights plaintiffs seek to vindicate are state rights by *nature*. Even though the historical source of these rights was a federal statute, it is the clear state *nature* of the rights which governs our decision. *Gully v. First Nat'l Bank, supra*, 299 U.S. at 114, 116, 57 S.Ct. 96, 81 L.Ed. 70; *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 483, 53 S.Ct. 447, 77 L.Ed. 903 (1933); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 20 S.Ct. 726, 44 L.Ed. 864 (1900). We therefore conclude that the Commission Act claims do not arise under federal law.

Thus, we hold that plaintiffs' claims which are based on the Hawaii Admission Act must be dismissed on the ground that the Act does not provide an implied individual cause of action. This is a dismissal on the merits. *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 90 L.Ed 939 (1946). Plaintiffs' claims which are based on the Commission Act must be dismissed for lack of federal subject matter jurisdiction.[12]

REVERSED.

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of their origin in a federal statute in spite of the otherwise wholly state nature of this dispute, we surely would have "put [the] compass by." *Gully v. First Nat'l Bank, supra*, 229 U.S. at 118, 57 S.Ct. 96.

[12] Section 4 of the Admission Act provides in part:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State . . . subject to amendment or repeal only with the consent of the United States, and in no other manner . . . .

[footnote continued]

From this language, plaintiffs argue that the Commission Act is now "the substance of a compact between the United States and the State of Hawaii." Therefore, argue plaintiffs, an action charging a breach of the Commission Act arises under federal law. *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517 (9th Cir. 1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1398, 43 L.Ed.2d 654 (1975). We disagree.

This language from section 4 clearly indicates that the substance of the compact was Hawaii's agreement to adopt the Commission Act as a provision of its constitution and not to amend the Act without the consent of Congress. We do not agree that this language is sufficient to incorporate the substance of the Commission Act itself as a federal-state compact.

APPENDIX E

HAWAIIAN HOMES COMMISSION ACT, 1920

(Act of July 9, 1921, c 42, 42 Stat 108)

§202. Department officers, staff, commission, members, compensation. (a) There shall be a department of Hawaiian home lands which shall be headed by an executive board to be known as the Hawaiian homes commission. The members of the commission shall be nominated and appointed in accordance with section 26-34, Hawaii Revised Statutes. The commission shall be composed of seven members, four of whom shall be residents of the city and county of Honolulu; of the remaining members, one shall be a resident of the county of Hawaii, one a resident of the county of Maui, and one a resident of the county of Kauai. All members shall have been residents of the State at least three years prior to their appointment and at least four of the members shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian islands previous to 1778. The members of the commission shall serve without pay, but shall receive actual expenses incurred by them in the discharge of their duties as such members. The governor shall appoint the chairman of the commission from among the members thereof.

The commission may delegate to the chairman, such duties, powers, and authority or so much thereof, as may be lawful or proper for the performance of the functions vested in the commission. The chairman of the commission shall serve in a full-time capacity. He shall, in such capacity, perform such duties, and exercise such powers and authority, or so much thereof, as may be delegated to him by the commission as herein provided above.

(b) The provisions of section 76-16(0) Hawaii Revised Statutes, shall apply to the positions of the first deputy and private secretary to the chairman of the commission. All other positions in the department shall be subject to the provisions of chapters 76 and 77, Hawaii Revised Statutes, and employees having tenure, according to the employment practices of the department, immediately prior to [June 20, 1963] and occupying positions in accordance with the state's position classifications and compensation plans shall be given permanent appointment status under chapter 76 without a reduction in pay or the loss of seniority, prior service credit, vacation or sick leave earned heretofore. An employee with tenure who does not occupy a position under chapters 76 and 77 shall be appointed to the position after it has been classified and assigned to an appropriate salary range by the director of personnel services and such employee shall not suffer a reduction in pay or loss of seniority and other credits earned heretofore.

All vacancies and new positions which are covered by the provisions of chapters 76 and 77, Hawaii Revised Statutes, shall be filled in accordance with the provisions of sections 76-23 and 76-31, Hawaii Revised Statutes, provided that the provisions of these sections shall be applicable first to qualified persons of Hawaiian extraction. (Am Jul. 26, 1935, c 420, §1, 49 Stat 504; May 31, 1944, c 216, §1, 58 Stat 260; Jul. 1, 1952, c 618, 66 Stat 515, am L 1963, c 207, §1; am imp L 1965, c 223, §§5, 8]

§204. [Control by department of "available lands"; return to board of land and natural resources, when.] Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the department to be used

and disposed of in accordance with the provisions of this title, except that:

(1) In case any available land is under lease by the Territory of Hawaii, by virtue of section 73 of the Hawaiian Organic Act, at the time of the passage of this Act, such land shall not assume the status of Hawaiian home lands until the lease expires or the board of land and natural resources withdraws the lands from the operation of the lease. If the land is covered by a lease containing a withdrawal clause, as provided in subdivision (d) of section 73 of the Hawaiian Organic Act, the board of land and natural resources shall withdraw such lands from the operation of the lease whenever the department, with the approval of the Secretary of the Interior, gives notice to it that the department is of the opinion that the lands are required by it for the purposes of this title; and such withdrawal shall be held to be for a public purpose within the meaning of that term as used in subvision (d) of section 73 of the Hawaiian Organic Act;

(2) Any available land, including land selected by the department out of a larger area, as provided by this Act, as may not be immediately needed for the purposes of this Act, may be returned to the board of land and natural resources and may be leased by it as provided in chapter 171, Hawaii Revised Statutes, or may be retained for management by the department.

Any lease by the board of land and natural resources of Hawaiian home lands hereafter entered into shall contain a withdrawal clause, and the lands so leased shall be withdrawn by the board of land and natural resources, for the purpose of this Act, upon the department giving at its option, not less than one nor more than five years' notice of such withdrawal; provided, that the minimum

withdrawal-notice period shall be specifically stated in such lease.

In the management of any retained available lands not required for leasing under section 207(a), the department may dispose of such lands by lease or license to the general public, including native Hawaiians, on the same terms, conditions, restrictions and uses applicable to the disposition of public lands as provided in chapter 171; provided, that the department may not sell such lands in fee simple except as authorized under section 205 of this Act.

(3) The department shall not lease, use, nor dispose of more than twenty thousand (20,000) acres of the area of Hawaiian home lands, for settlement by native Hawaiians, in any calendar five-year period.

(4) The department may, with the approval of the governor and the Secretary of the Interior, in order to consolidate its holdings or to better effectuate the purposes of this Act, exchange the title to available lands for land, publicly owned, of an equal value. All land so acquired by the department shall assume the status of available lands as though the same were originally designated as such under section 203 hereof, and all lands so conveyed by the department shall assume the status of the land for which it was exchanged. The limitations imposed by section 73 (1) of the Hawaiian Organic Act and the land laws of Hawaii as to the area and value of land that may be conveyed by way of exchange shall not apply to exchanges made pursuant hereto. No such exchange shall be made without the approval and of two-thirds of the members of the board of land and natural resources. [Am Mar. 27, 1928, c 142, §1, 45 Stat 246; Jul. 10, 1937, c 482, 50 Stat 503; Feb. 20, 1954, c 10, §1, 68 Stat 16; June 18, 1954, c 319, §1, 68 Stat 262; am L 1963, c 207, §§2, 5(b); am L 1965, c 271, §1].

§205 [Sale or lease, limitations on.] Available lands shall be sold or leased only (1) in the manner and for the purposes set out in this title, or (2) as may be necessary to complete any valid agreement of sale or lease in effect at the time of the passage of this Act; except that such limitations shall not apply to the unselected portions of lands from which the department has made a selection and given notice thereof, or failed so to select and give notice within the time limit, as provided in paragraph (3) of section 204 of this title. [Am L 1963, c 207, §2]

§206. [Other officers not to control Hawaiian home lands; exception.] The powers and duties of the governor and the board of land and natural resources, in respect to lands of the State, shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title. [Am L 1963, c 207, §5 (a) (b)]

§207. [Leases to Hawaiians, licenses.] (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not less than one nor more than forty acres of agricultural lands; or (2) not less than one hundred nor more than five hundred acres of first-class pastoral lands; or (3) not less than two hundred and fifty nor more than one thousand acres of second-class pastoral lands; or (4) not less than forty nor more than one hundred acres of irrigated pastoral lands; (5) not more than one acre of any class of land to be used as residence lot: provided, however, that in the case of any existing lease of a farm lot in the Kalanianaole Settlement on Molokai, a residence lot may exceed one acre but shall not exceed four acres in area, the location of such area to be selected by the lessee concerned: provided further, that a lease granted

to any lessee may include two detached farm lots located on the same island and within a reasonable distance of each other, one of which, to be designated by the department, shall be occupied by the lessee as his home, the gross acreage of both lots not to exceed the maximum acreage of an agricultural or pastoral lot, as the case may be, as provided in this section.

(b) The title to lands so leased shall remain in the [State]. Applications for tracts shall be made to and granted by the department, under such regulations, not in conflict with any provisions of this title, as the department may prescribe. The department shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease.

(c) (1) The department is authorized to grant licenses for terms of not to exceed twenty-one years in each case, to public utility companies or corporations as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like. The department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, to-

(A) churches, hospitals, public schools, post offices, and other improvements for public purposes;

(B) theatres, garages, service stations, markets, stores, and other mercantile establishments (all of which shall be owned by lessees of the department or by organizations formed and controlled by said lessees).

(2) The department is also authorized, with the approval of the governor, to grant licenses to the United States for terms not to exceed five years, for reservations, roads, and other rights-of-way, water storage and dis-

tribution facilities, and practice target ranges: provided, that any such license may be extended from time to time by the department, with the approval of the governor, for additional terms of three years: provided further, that any such license shall not restrict the areas required by the department in carrying on its duties, nor interfere in any way with the department's operation on maintenance activities. [Am Feb. 3, 1923, c 56, §1, 42 Stat 1222; May 16, 1934, c 290, §2, 48 Stat 779 Jul. 10, 1937, c 482, 50 Stat 504; May 31, 1944, c 216, §§3, 4, 58 Stat 264; Jun. 14, 1948, c 464, §§1, 2, 62 Stat 390, Jun. 18, 1954, c 321, §1, 68 Stat 263; Aug. 23, 1958, Pub L 85-733, 72 Stat 822, am L 1963, c 207, §2]

THE ADMISSION ACT

An Act to Provide for the Admission of the State of Hawaii into the Union

(Act of March 18, 1959, Pub L 86-3, 73 Stat 4)

§4. As a compact with the United States relating to the management and dispostion of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, that (1) sections 202, 213, 219, 220, 222, 224 and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced nor impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands," and defined by said Act, shall be used only in carrying out the provisions of said Act.

§5. (b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

(h) All laws of the United States reserving to the United States the free use or enjoyment of property which vests in or is conveyed to the State of Hawaii or its political subdivisions pursuant to subsection (a), (b), or (e) of this section or reserving the right to alter, amend, or repeal laws relating thereto shall cease to be effective upon the admission of the state of Hawaii into the Union.

28 U.S.C. § 1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controvesy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

As amended Oct 21, 1976, Pub. L. 94-574, § 2, 90, Stat. 2721.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 74-12

GEORGIANA K. KILA,
Individually and on behalf of all persons
similarly situated,
Plaintiff,

HARRIET AU HOON,
Intervenor,

v.

HAWAIIAN HOMES COMMISSION, and
WILLIAM G. AMONG, in his capacity as
Chairman of the Hawaiian Homes Commission,
Defendants.

DECISION ON PLAINTIFF'S AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Plaintiff, Georgiana K. Kila, and Intervenor, Harriet Au Hoon, bring this action for damages and injunctive and declarative relief against the Hawaiian Homes Commission and its Chairman, William C. Among, in his official capacity. Both plaintiff and intervenor presently lease land from the Hawaiian Homes Commission and have secured $17,500.00 and $18,000.00 loans, respectively, from the Hawaiian home loan fund, Hawaiian Homes Commission Act (hereinafter HHCA) § 213(b)

(6).[1] Each of their loan contracts contains a convenant obligating them to pay 7.5% interest per annum on the unpaid principal. After obtaining the loans, plaintiff and intervenor both apparently fell behind in their payments and were given notice by the Hawaiian Homes Commission that hearings would be held to determine whether or not delinquencies existed and if they did, whether or not their leases should be cancelled. It appears from the record that Kila was never afforded a hearing but that Hoon was given a hearing, found to be delinquent and ordered to pay the overdue amounts pursuant to a schedula established by the Commission.

In Count I of her complaint, plaintiff seeks a declaration that the 7.5% interest rate which she is currently being charged on her loan is unlawful since it is authorized by an unlawful amendment to the HHCA whereby, in 1965, the Hawaii State Legislature added thereto §213 (b)(5)[2] without the consent of the United States and in

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[1] (6) The department may borrow and deposit into the special revolving account for the purposes of repairing or maintaining or purchasing or erecting or improving dwellings on Hawaiian home lands and non-Hawaiian home lands and related purposes as provided for in the second paragraph of (8) hereinafter, from financial institutions, governmental or private, and if necessary in connection therewith, to pledge, secure or otherwise guarantee the repayment of moneys borrowed with all or a portion of the estimated sums of Additional Receipts for the next ensuing ten years from the date of borrowing, less any portion thereof previously encumbered for similar purposes;

[2] (5) The department shall establish interest rate or rates at two and one-half per cent a year or higher, in connection with authorized loans on Hawaiian home lands or non-Hawaiian home lands, and where the going rate of interest on moneys borrowed by the department under (6) immediately following or loans made by financial institutions to native Hawaiians is higher, pay from the special revolving fund from either the Additional Receipts-Loan Fund Portion or the moneys borrowed, the difference in interest rates;

conflict with §215(2)[3] of the Act. She therefore asks for a refund of overpayments and a reformation of her loan contract. Plaintiff Kila's motion for partial summary judgment as to Count I is now before the court for decision.

JURISDICTION

Plaintiff alleges that this court has jurisdiction over the subject matter of her action under 28 U.S.C. 1331. There being no question in regard to the jurisdictional amount in this case, the sole issue is whether or not plaintiff's action "arises under" the laws of the United States. The essence of plaintiff's case is that the State's amendment of HHCA §213(b) by adding subsection (5) violated §4 of the Admissions Act, Act of March 18, 1959, Pub. L. 86-3, §4, 73 Stat. 4,[4] since the prior consent of

[3](2) The loans shall be repaid in periodic installments, such installments to be monthly, quarterly, semi-annual, or annual as may be determined by the department in each case. The term of any loan shall not exceed thirty years. Payments of any sum in addition to the required installments, or payment of the entire amount of the loan, may be made at any time within the term of the loan. All unpaid balances of principal shall bear interest at the rate of two and one-half per cent a year payable periodically or upon demand by the department, as the department may determine. The payment of any installment due shall be postponed in whole or in part by the department for such reasons as it deems good and sufficient and until such later date as it deems advisable. Such postponement payments shall continue to bear interest at the rate of two and one-half per cent a year on the unpaid principal.

[4]As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of [this] State, as provided in Section 7, subsection (b) of [the Admission Act], subject to amendment or repeal only with the consent of the United States, and in no other manner. *Provided*, That (1) sections 202, 213, 219, 220,

[footnote continued]

the United States was not obtained. Plaintiff urges that her action, therefore, "arises under" a law of the United States, viv., the Admissions Act.

To arise under a federal law, an action must be based essentially on a right created by that law; the validity of the asserted right must rest primarily on the construction or effect given to the federal law. *Wheeldin v. Wheeler*, 373 U.S. 647 (1963); *Gully v. First National Bank*, 299 U.S. 109 (1936); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). Here, therefore, plaintiff's success or failure depends substantially on this court's interpretation of that portion of the Admissions Act which establishes the circumstances in which the HHCA may be amended *without* the consent of the United States. This court, therefore, has original jurisdiction of this case under 28 U.S.C. 1331.[5] Whatever residual state law

222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required by State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

[5]See, *Haire v. Rice*, 204 U.S. 291 (1906); *Doucette v. Vincent*, 194 F.2d 834, 846 (1st Cir. 1952); *United States v. Fenton.*

[footnote continued]

issues which might exist because of the ambiguous nature of the HHCA would fall within the pendent jurisdiction of this court. *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

The HHCA was enacted by the United States Congress in 1921. Act of July 9, 1921, ch. 42, 42 Stat. 108. In the Act Congress set aside certain public lands in Hawaii to be used to provide for the welfare and rehabilitation of native Hawaiians. Until Hawaii's admission into the Union as a state in 1959, the Act was codified in 48 U.S.C. 691 et seq. Upon Hawaii's admission the Act acquired a unique, hybrid character. It was omitted from Title 48 since "the scope of this title limits it to general and permanent laws applicable to Territories and Insular Possessions, and Hawaii was admitted to the Union as a state on August 21, 1959." 48 U.S.C. §§491-724 (1970). The omission of the Act from Title 48 makes suspect its status as a federal law. In §4 of the Admissions Act, the act admitting Hawaii to the Union as a state, however, Congress compacted with the State that the Hawaiian Homes Commission Act, 1920, as amended, must be adopted as a provision of the State Constitution. The Act was therefore adopted as a law of the State of Hawaii in the State Constitution as Art. XI, §§1, 2. The HHCA, 1920, thus now appears to be a Federal law, a State law, and also the substance of a compact between the United States and the State of Hawaii.

Both the Admissions Act and the State Constitution delineate the methods by which the HHCA may be amended.[6] Certain provisions of the Act relating to

27 F.Supp. 816 (S.D. Idaho 1939). *But cf., Kennard v. Nebraska*, 186 U.S. 304 (1901); *Jones v. Brush*, 143 F.2d 733 (9th Cir. 1944); *Cranston v. Aronson*, 124 F.Supp. 453 (D. Mont, 1953).

[6] Act of March 18, 1959, Pub. L. 86-3, §4, 73 Stat. 4; Hawaii Const. art. XI, §3.

administration, duties of non-administrative officials, and the increase of benefits to lessees (native Hawaiians) may be amended "in the constitution, or in the manner required for State legislation . . . ." Generally speaking, all other provisions may be amended only with the consent of the United States.[7]

At the time of Hawaii's admission to the Union as a state, HHCA §213(a) then 48 U.S.C. 707(a) "established in the treasury of the Territory two revolving funds to be known as the Hawaiian home-loan fund and the Hawaiian home-operating fund, and two special funds to be known as the Hawaiian home-development fund and the Hawaiian home-administration account." The Hawaiian home-loan fund, HHCA §213(b), then consisted primarily of up to $5,000,000.00, to be derived from the Territory's lease receipts paid to the Territory by lessees of cultivated sugar-cane lands. From this fund loans were to be made available to lessees for purposes including "[t]he erection of dwellings . . . ." HHCA §214, 48 U.S.C. 708.

[7] S. Rep. No. 80, 86th Cong., 1st Sess. (1959), in which the Senate approved admitting Hawaii to the Union as a State, analyzed §4 of the Admissions Act as follows:

> Section 4 requires the State of Hawaii to adopt the Hawaiian Homes Commission Act, 1920, as a provision of its constitution and provides that it shall not be changed in its basic provisions except with the consent of the United States. Article XI of the constitution of Hawaii conforms to this requirement. The Hawaiian Homes Commission Act is a law which set aside certain lands in order to provide for the welfare of native Hawaiians. While the new State will be able to make changes in the administration of the act without the consent of Congress, it will not be authorized, without such consent, to impair by legislation or constitutional amendment the funds set up by under it or to disturb in other ways its substantive provisions to the detriment of the intended beneficiaries. 2 U.S. Code Cong. & Ad. News 1346, 1361 (1959).

The affidavit of defendant Among indicates that ". . . . in early 1964, the maximum authorized amount [$5,000,000.00] of the Hawaiian Home-loan Fund was reached . . . ." In 1965, the State Legislature recognized that "[i]n the past there has been a continued scarcity of funds available to support worthwhile home loans" and it amended §213(b) by providing "additional benefits . . . so long as . . . the department is unable to generate from its own lands the kinds of income necessary to finance the vigorous kinds of rehabilitation measures included in these proposed amendments . . . ." H.R. Stand, Comm. Rep. No. 184, Hawaii H.R.J. 576, 577 (1965). The additional benefits provided in the amendment included (in §213(b) subsection (6) which allowed the department to augment the basic $5,000,000.00 Hawaiian home-loan fund by borrowing from governmental financial institutions and depositing the funds *into a special revolving account of the loan fund* for the purpose of purchasing, erecting or improving dwellings on Hawaiian home lands. Kila's loan came from funds which had been borrowed from the Hawaii Housing Authority and deposited in the special revolving fund created by subsection (6).[8]

The department,[9] pursuant to its rule-making power established in HHCA §222 and §4 of the 1965 Amendment to HHCA §213(b), promulgated section 11.05 of the department's rules and regulations which provides:

> The Department may borrow funds from other sources to make loans available to qualified applicants and homesteaders to build, replace or purchase homes on or off Hawaiian home lands.
>
> *Hawaii Housing Authority:* The Department shall make available to qualified Hawaiians loans from monies loaned to the Department by Hawaii Housing Authority. Such loans may be made from construction of homes for lessees on Hawaiian home lands only. Such loans shall bear the same interest rate charged by Hawaii Housing Authority to the Department and shall not be governed by the restrictions as to interest rates set forth in the Hawaiian Homes Commission Act. Applicants need only qualify as to blood and have a homestead lease to apply for such loans and are not restricted to any income level.
>
> *Retirement System:* The Department may make loans to applicants on non-Hawaiian home lands who qualify as native Hawaiians as that term is used in the Act. Such loans shall be made with monies borrowed from the State Retirement System and other lending institutions and the interest charged to borrowers shall be the same interest as that paid by the Department to the lender.

Pursuant to section 11.05 of its rules, the department exacted the same 7.5% interest rate from Kila as it was obligated to pay to the Hawaii Housing Authority.

Plaintiff's first argument is that the interest rates are substantive conditions in loan contracts, that they are not administrative in nature and, therefore, may not be the subject of legislative amendment without the consent of the United States. Therefore, plaintiff urges, the 7.5% interest rate is unlawful. Presupposing that interest rates are substantive conditions of loan contracts under the Act, not all substantive, non-administrative amendments

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[8] See Law of July 14, 1969, ch. 239, §1 (A) (now H.R.S. §359G-10.1 (Supp. 1973).

[9] The "department" is the "department of Hawaiian home lands [which is] headed by an executive board known as the Hawaiian homes commission . . . ." HHCA §202(a).

to the HHCA, however, require the consent of Congress; both the Admissions Act and the Hawaii Constitution provide:

. . . .

> (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; . . . .[10]

Notwithstanding the fact the 7.5% interest rate is higher than the 2.5% mandated by HHCA §215(2), this court holds that the 1965 amendment, clearly intending to make available to the native Hawaiians for homes, monies not otherwise obtainable, can only rationally be construed as a whole, severable from the basic HHCA. Thus, §213(5) and (6) together with section 11.05 of the department's rules constitute a separable and unified procedure by which benefits to lessees, such as the plaintiff, might be increased; therefore, the 1965 amendment to §213(b) need not have been consented to by the United States.

Plaintiff's second argument is one based on the construction of the HHCA. Plaintiff contends that §213(5) violates §215(2) and is therefore null and void. Section 215(2) provides in part that "All unpaid balances of principal shall bear interest at the rate of two and one-half per cent a year payable periodically or upon demand by the department, as the department may determine." The 2.5% rate was established by Congress in 1952. Act of

[10] Act of March 18, 1959, Pub. L. 86-3, §4, 73 Stat. 4; Hawaii Constitution, art XI, §3.

July 9, 1952, ch. 615, §4, 66 Stat. 514. Until 1965, this was the only interest rate applicable to borrowers from the Hawaiian home-loan fund. However, as noted earlier, before 1965 the Hawaiian home-loan fund consisted, basically, of the $5,000,000.00 authorized by the Act of July 9, 1952, ch. 615, 66 Stat. 514. The 1965-created §213(b)(6), special revolving fund, did not exist. Thus the 2.5% interest rate of §215(2) applied only to loans made from the original $5,000,000.00 Hawaiian home-loan fund. Indeed, Among's affidavit indicates that loans currently being made from the basic $5,000,000.00 fund are still made at the 2.5% interest rate required by §215(2). As indicated heretofore, this court holds that §213(b)(5) applies to and lawfully authorizes interest rates higher than 2.5% to be charged only on loans from funds other than those existing at the time Hawaii was admitted to the Union as a State.

As above indicated, the purpose of the 1965 amendment to §213(b) was to provide additional benefits to lessees. Additional benefits were provided by the creation of severl new funds from which more loans could be made: the Additional Receipts-Development Fund Portion, the Additional Receipts-Loan Fund Portion and the special revolving fund consisting of borrowed monies. To hold that §215(2) prohibits charging interest at a rate higher than 2.5% on loans from these completely new funds would be contrary to the power given to the State, in both §4 of the Admissions Act and Art. XI, §3, of the Hawaii State Constitution, to increase benefits to lessees without the consent of the United States. There is no conflict between §213(b)(5) and §215(2). They apply to severable and separate funds.

Although defendants have not by any formal pleading squarely presented to this court a motion for dismissal or

for summary judgment, nevertheless, in their "Memorandum in Opposition" to plaintiff's motion, defendants have, inartfully, set out three contentions that this court can and does construe as motions to dismiss or for summary judgment. Matters outside the pleadings have been presented in response to both plaintiff's motion and defendants' contentions, and the case has been argued on the merits.

As heretofore indicated, defendants' contentions that this court lacks subject matter jurisdiction, as well as that this court should abstain, are without merit.

Defendants' third contention that the complaint fails to state a claim upon which relief can be granted has presented justicable issues.

For the reasons set forth above, plaintiff's motion for partial summary judgment is *DENIED.*

Construing defendants' third contention as a motion for summary judgment, defendants' motion is *GRANTED.*[11]

Defendants will prepare the necessary order.

DATED: Honolulu, Hawaii, September 16, 1974.

United States District Judge

---

[11] This court, sua sponte, questioned counsel as to the application of the Equal Footing doctrine to the Congressional mandate that Hawaii adopt the HHCA into its laws as a condition of admission. Since no party disagreed thereon, the question never became an issue and is not by this decision resolved. See, *Moore v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 47 (1970).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1539

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, KEAUKAHA-PANAEWA FARMERS ASSOCIATION, ISABEL LEINANI KNUTSON, ERMA KALANUI and APRIL KAMAKAOKALANIMALUNAO'E KALANUI, by her guardian ad litem, ERMA KALANUI, individually and on behalf of all persons similarly situated,

Plaintiffs-Petitioners,

vs.

HAWAIIAN HOMES COMMISSION, BILLIE BEAMER, in her capacity as Chairman of the Hawaiian Homes Commission, THE DEPARTMENT OF HAWAIIAN HOME LANDS,

Defendants-Respondents,

and

COUNTY OF HAWAII, EDWARD HARADA, in his capacity as Chief Engineer, County of Hawaii,

Defendants,

and

JAMES W. GLOVER, LTD., A Hawaii Corporation,

Defendant.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I.

PRELIMINARY STATEMENT

In this action native Hawaiians seek review of the Ninth Circuit's denial of a private right of action to remedy breaches of trust by state officials in the administration of the Hawaiian Homes program. Since the filing of the Petition for a Writ of Certiorari this Court has decided several cases dealing with implied rights of action. The recent cases, however, leave open major questions which are raised by the decision of the Ninth Circuit in this action regarding the balancing of the four factors set out in *Cort v. Ash*, 422 U.S. 66 (1975).

In this action the Ninth Circuit expressly found that the federal statute imposing the trust was "intended especially to benefit Native Hawaiians." 588 F.2d 1216, 1223. In *Cannon v. University of Chicago*, 47 U.S.L.W. 4549 (1979), this Court noted that it had never denied a private right of action to an expecially benefitted class except in one unusual case. This case, therefore, raises the question of the proper balancing of the *Cort* factors when members of an especially benefitted class claim a cause of action.

Additionally, the Assistant Attorney General for the Land and Natural Resources Division of the Department of Justice and the Secretary of the Interior through the Office of the Solicitor of the Department of the Interior have recently indicated their disagreement with the opinion of the Ninth Circuit. Contrary to the opinion of the Ninth Circuit, the Interior Department has taken the position that the United States has retained its role as trustee of the Hawaiian Homes program and has made the State of Hawaii its instrument for carrying out the federal trust. See Appendix "A" hereto. In addition, the Department of Justice indicated its disagreement with the

denial of a private right of action to the Hawaiian Homes beneficiaries to enforce that trust. See Appendix "B" hereto. These views establish that the Ninth Circuit improperly applied the third and fourth *Cort* factors to Petitioner's claims.

Finally, this Court's recent decision in *Chapman v. Houston WRO*, 47 U.S.L.W. 4528 (1979), expressly left open the question of whether the "and laws" language of 42 U.S.C. § 1983 provides a remedy for federal statutory, non-constitutional violations when jurisdiction is founded on 28 U.S.C. §1331. That issue is squarely presented in this case because Petitioners specifically complained of deprivations under color of state law of rights guaranteed by the Hawaii Admission Act of 1959.

This Court's recent decisions regarding the implication of a right of action and leaving open the question of an express right of action under the "and laws" language of 42 U.S.C.§1983 plus the recent opinions of two federal agencies regarding this trust for native Hawaiians militate in favor of a grant of the Writ to settle these important questions. Failing a grant of the Writ, at a minimum, this case should be remanded for reconsideration by the Ninth Circuit *en banc* in the light of these significant recent developments.

II.

THIS CASE RAISES THE QUESTION OF THE PROPER BALANCING OF THE FOUR *CORT* FACTORS WHEN THE STATUTE BENEFITS AN ESPECIAL CLASS

During the last term this Court decided several cases dealing with the implication of a private right of action under a federal statute where no private remedy is expressly provided. In *Cannon v. University of Chicago*, 47 U.S.L.W. 4549 (1979) this Court reversed the decision

of the Seventh Circuit, 559 F.2d 1063, upon which the Ninth Circuit relied to deny Petitioners a private right of action in this case. In applying the second *Cort* factor the Ninth Circuit reasoned that since the Hawaii Admission Act reserves to the United States the right to bring suit to remedy a breach of trust, then Congress must have intended that remedy to the exclusive. To reach that result the Ninth Circuit applied the maxim *expressio unius est exclusio alterius* of *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974), (*Amtrak*), even though recognizing that its application had been criticized in *Cort v. Ash, supra.* In reversing the Seventh Circuit in *Cannon,* this Court undercut even further the application of the *expressio unius* maxim of *Amtrak. See Cannon,* 47 U.S.L.W. at 4557. The Court noted in *Cannon* that, with only one rare exception, it has never denied a private right of action "where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." 47 U.S.L.W. at 4552, n.13.[1] This Court went on to say, regarding the second *Cort* test:

> Therefore, in situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling. *Cort, supra,* 422 U.S. at 82 (Emphasis in original). *Cannon,* 47 U.S.L.W. at 4533.

[1] n. 13 in *Cannon* was also cited with approval last term in *Davis v. Passman,* 47 U.S.L.W. 4643 at 4645, n. 10, in which this Court found a cause of action for a constitutional violation.

Thus, in the absence of an explicit purpose to deny native Hawaiians a cause of action, the Ninth Circuit should not have disturbed the District Court's ruling.

In analyzing the second *Cort* factor, the Ninth Circuit noted that in *Cort v. Ash, supra,* this Court had criticized the broad application of the *expressio unius* maxim of *Amtrak* but stated that *Amtrak* still had some viability on this point. However, in *Cannon* the Court held that when an especial class is benefitted, even the existence of administrative remedies does not militate against a private cause of action when the beneficiaries of the statute are not assured "the ability to activate and participate in the administrative process contemplated by the statute." *Cannon,* 47 U.S.L.W. at 5556, n. 41. Footnote 41 also points out the ineffectiveness of a public remedy if the responsible federal agency lacks adequate enforcement resources.[2] Under the circumstances it was error to apply the *expressio unius* maxim for three reasons: (1) the native Hawaiian Petitioners are an especially benefitted class under the Admission Act, (2) they have no ability to invoke or participate in the public enforcement of the Act, and (3) there is a lack of sufficient enforcement resources to guarantee public enforcement.

III.

RECENT AGENCY OPINIONS SHOW THAT THE NINTH CIRCUIT IMPROPERLY APPLIED THE THIRD AND FOURTH *CORT* FACTORS

Recent opinions by the Department of Justice and the Department of the Interior also demonstrate that the Ninth Circuit improperly applied the third and fourth

[2] *See Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 374 (1968) discussed at p. 12 of the Petition for Writ of Certiorari, wherein the Court noted the "staggering problem" for the United States in enforcing its trust obligations to native Americans.

Cort factors. The Ninth Circuit only devoted two paragraphs to the third and fourth factors and based its decision on a false assumption, made without analyzing the issue, that "the Admission Act was intended to transfer complete ownership and responsibility [of the Hawaiian home lands] to Hawaii." In addition the Ninth Circuit stated:

> With Hawaii's admission into the Union, the national government virtually relinquished its control over and interest in the Hawaiian home lands. The problem described in Plaintiff's complaint is essentially a matter of state concern . . . 588 F.2d at 1224.

This assumption is contradicted by the Deputy Solicitor of the Department of the Interior. See Appendix "A" hereto. In an August 27, 1979 letter to the Director of the Western Regional Office of the United States Commission on Civil Rights, Deputy Solicitor Frederick N. Ferguson of the Department of the Interior stated:

> Taken together, the responsibilities of the federal government are more than merely supervisory and the United States can be said to have retained its role as trustee under the Act while making the state its instrument for carrying out the trust . . . Appendix A, p. 4.

The Department of Justice has also indicated its disagreement with the Ninth Circuit in this case.[3] The Assistant Attorney General of the Land and Natural Resources Division of the Department of Justice in a letter of August 13, 1979 to the United States Commission on Civil Rights (See Appendix B hereto) stated:

[3]See also *Amicus Curiae* Brief of the United States in the Ninth Circuit Court of Appeals reproduced as Appendix C to the Petition for a Writ of Certiorari in this case.

> It is our view, however, that individual beneficiaries of the trust may also file suit if they believe the trust to have been violated. In this respect, we disagree with the Ninth Circuit's decision in *Keaukaha-Panaewa, supra.* App. B at p. 2.

Accordingly, implication of a cause of action in favor of native Hawaiians is consistent with the purposes of the Admission Act. As this Court recognized in *Cannon,* 47 U.S.L.W. at 4556, the opinion of the agency charged with enforcement is entitled to great weight in application of the third *Cort* factor. Because the Ninth Circuit incorrectly assumed that the United States no longer has a trust obligation to native Hawaiians, it improperly applied the third *Cort* factor to conclude that an action in federal court would serve no federal purpose.

Similarly the erroneous assumption that the Hawaiian Homes program is purely a state matter also led to the misapplication of the fourth *Cort* criterion to conclude that Petitioners are complaining about a matter which is essentially a state concern. As stated by the Solicitor for the Interior Department, the United States is the trustee for native Hawaiians and the state is acting as the agent of the United States. Therefore, this is not a matter purely of traditional state concern.

IV.

THIS CASE RAISES THE QUESTION OF THE BREADTH OF THE "AND LAWS" LANGUAGE OF 42 U.S.C. §1983

Last term this Court expressly left open the question of whether persons claiming a deprivation under color of state law of rights and privileges guaranteed by a federal statute have an express cause of action pursuant to 42 U.S.C. §1983 when jurisdiction is based upon 28 U.S.C. §1331. *Chapman v. Houston WRO,* 47 U.S.L.W. 4528 (1979). Petitioners alleged such a deprivation in the jurisdictional allegations of their complaint and they

relied on 28 U.S.C. §1331 as well as §1343(3) and (4) for jurisdiction. As pointed out last term in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 47 U.S.L.W. 4256, 4259, there is no need to even address the question of whether there is an implied private right of action if §1983 is applicable. The question of the breadth of §1983 is obviously of great importance in determining jurisdiction whenever litigants claim a right of action for deprivation of any federal statutory right under color of state law. If this Court finds a cause of action under such circumstances, then the test of *Cort v. Ash*, with all of its problems, will be avoided.

The Ninth Circuit has recently addressed the question left open in *Chapman v. Houston WRO, supra,* in *Tongal v. Usery*, _____ F.2d _____, Nos. 77-2291, 77-3351 decided August 6, 1979, and held that a claim of a deprivation under color of state law of a federal statutory right is proper under 42 U.S.C. §1983. The Ninth Circuit also held in *Tongal* that jurisdiction was proper under 28 U.S.C. §1361, and therefore that §1983 is not co-extensive with 28 U.S.C. §1343. Therefore, this issue is appropriate for review.

V.

CONCLUSION

Since the Ninth Circuit rendered its decision and the native Hawaiians filed their Petition for a Writ of Certiorari in this matter, this Court has rendered a number of major decisions which raise new questions regarding implied rights of action and express rights of action under 42 U.S.C. §1983. The Ninth Circuit held that native Hawaiians are an especially benefitted class under the Hawaii Admission Act which they seek to

enforce, yet the Ninth Circuit denied the native Hawaiians a private right of action, a result which this Court has approved on only one occasion. *See Cannon v. University of Chicago, supra.* This case raises the problem of the proper balancing of the four factors of *Cort v. Ash* when plaintiffs are members of an especially benefitted class. The Court noted last term in *Touche Ross and Co. v. Reddington*, 47 U.S.L.W. 4732 (1979), that the four *Cort* factors are not entitled to equal weight, but gave no guidance for the balancing of such factors when plaintiffs are members of the class especially benefitted under the federal statute.

Since Petitioners also asserted a cause of action under 42 U.S.C. §1983, this Court should now grant the Writ of Certiorari to determine whether the district court had jurisdiction over such a cause of action pursuant to 28 U.S.C. §1331.

Finally, in light of the recent decisions of this Court and the opinions of the Department of the Interior and the Department of Justice asserting a federal trust responsibility to native Hawaiians and urging a private right of action, if this Court does not grant the Writ it should remand this action to the Ninth Circuit for reconsideration *en banc*.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Seal]

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20040

August 27, 1979

Mr. Philip Montez, Director
Western Regional Office
United States Commission on Civil Rights
312 North Spring Street, Room 1015
Los Angeles, CA 90012

Dear Mr. Montez:

The Secretary has asked me to respond to your letter of August 1, 1979, regarding the responsibility of the United States for enforcement of the provisions of the Hawaiian Homes Commission Act, 1920, and the Hawaii Admission Act of 1959 relating to the Hawaiian home lands.

Your first question relates to section 5 of the Hawaii Admission Act, Act of March 18, 1959, Public Law 86-3, §5, 73 Stat. 5, as amended by Act of July 12, 1960, Public Law 86-624, §41, 74 Stat. 422. Under section 5(b) of the act, title to the Hawaiian home lands held by the United States for the benefit and rehabilitation of native Hawaiians under the Hawaiian Homes Commission Act, 1920, was transferred to the state. Under section 5(f) of the act, these lands, as well as the proceeds and income therefrom, are to be held by the state in trust for the betterment of the conditions of native Hawaiians as per the provisions of the Hawaiian Homes Commission

Act, 1920. See *Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission,* 588 F. 2d 1216, 1218, n. 2 (9th Cir. 1978) (petition for certiorari filed, No. 78-1539, April 9, 1979, 47 U.S.L.W. 3684). Use of the home lands for any other object "shall constitute a breach of trust for which suit may be brought by the United States." Hawaii Admission Act, §5(f). The answers to your specific questions with respect to these provisions are as follows.

(a) Section 5(f) of the Hawaii Admission Act confers enforcement and litigation authority on the United States. The Department of Justice is responsible for filing and prosecuting litigation on behalf of the United States; the Department of the Interior does not have independent litigation authority. 28 U.S.C. 516 (1976 ed.). With respect to legal matters relating to the powers and duties of the Secretary of the Interior or laws administered by the Department of the Interior, the Office of the Solicitor is responsible for making recommendations to the Department of Justice concerning the initiation of litigation. Although section 5(f) does not expressly refer to the Secretary of the Interior as the officer responsible for enforcing the trust, it is the Department's position that given the Secretary's longstanding involvement with Hawaiian home lands under the Hawaiian Homes Commission Act, 1920, this Department would be responsible for recommending to the Department of Justice that possible breaches of trust be investigated and that litigation to enforce the trust under section 5(f) be initiated where necessary.

(b) The use of the word "may" in section 5(f) suggests that the authority of the United States to prosecute breaches of the trust under this section is discretionary. In the area of the United States'

relationship with Indians and Indian tribes, which may or may not be analogous to the relationship between the United States and native Hawaiians under section 5(f), some courts have suggested that the federal government's trust responsibility requires the United States to sue on behalf of Indians or Indian tribes to protect Indian rights under federal law, or be liable to the Indians for breach of trust for any loss resulting from the failure to sue. See *United States v. Oneida Nation of New York,* 477 F.2d 939 (Ct. Cl. 1973); *Mason v. United States,* 461 F.2d 1364, 1372-73 (Ct. Cl. 1972), *rev'd.,* 412 U.S. 391 (1973); *cf. Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 388 F. Supp. 649, 663, n. 16, 665 (D. Me. 1975), *aff'd,* 528 F.2d 370, 375, 379 (1st Cir. 1975). As the potential liability of the United States may be involved, however, the Department cannot take a position on this issue outside the facts of a particular case in which the question is presented.

(c) This Department would recommend prosecution of any breach of trust which it found to be supported by the facts and legally meritorious.

(d) We have been unable to find any instance in which any action has been filed by the United States for breach of trust under section 5(f).

(e) The Ninth Circuit in construing section 5(f) recently stated: ". . . the state is the trustee. . . . * * * The United States has only a somewhat tangential supervisory role under the Admission Act, rather than the role of trustee." *Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, supra,* 588 F.2d at 1224, n. 7. It is true that the state, rather than the United States, holds title to the Hawaiian home lands for the use and benefit of native Hawaiians, while the United States' trust

responsibility with respect to Indian lands is due in large part to the fact that the United States holds legal title to the land in trust for Indian tribes and individual Indians. Nonetheless, it is the Department's position that the role of the United States under section 5(f) is essentially that of a trustee. Prior to statehood, the United States itself held title to the home lands in trust for native Hawaiians. The terms of that trust were defined by the provisions of the Hawaiian Homes Commission Act, 1920. Although the United States transferred the lands and the responsibility for administering the act to the state under the Admission Act, the Secretary of the Interior retained certain responsibilities, discussed below, which should be considered to be more than merely ministerial or nondiscretionary. The United States further provided that no substantive changes in the act, and thus in the terms of the trust itself, may be made without the consent of Congress and also retained authority to prosecute breaches of the trust. Taken together, the responsibilities of the federal government are more than merely supervisory and the United States can be said to have retained its role as trustee under the act while making the state its instrument for carrying out the trust. *Cf.* Act of August 4, 1947, c. 458, §1, 61 Stat. 731, 25 U.S.C. 355 note (1976 ed.); *Springer v. Townsend*, 336 F. 2d 397 (10th Cir. 1964) (state court, in approving, pursuant to federal statute, conveyance of restricted Indian land, acted as federal instrumentality).

Your second question relates to the duties of the Secretary of the Interior under sections 204(1), 204(4), and 212 of the Hawaiian Homes Commission Act, 1920, as amended. Section 204(1) provides that any "available lands" which were under lease on the date of enactment (July 9, 1921) would not become "home lands" until the

lease expired or until the lands were withdrawn from the operation of the lease by the government authorities responsible for public lands. Where such lands were covered by a lease containing a withdrawal clause, the lands could be withdrawn for use as home lands whenever the Commission (now the Department of Hawaiian Home Lands, Haw. Rev. Stat. §26-17) gave notice, with the approval of the Secretary of the Interior, that the lands were needed for the purposes of the act. It is unclear whether any "available lands" which were under lease in 1921 are still under lease. If not, the authority of the Department and the Secretary under this subsection is now obsolete. Under section 204(4), the Department of Hawaiian Home Lands is authorized to exchange title to "available lands" for public lands of equal value in order to consolidate its holdings or better carry out the purposes of the act. This authority is subject, however, to the approval of both the governor of the state and the Secretary of the Interior. Under section 212, the Department of Hawaiian Home Lands is authorized to return "home lands" to the control of the state government, in which case the lands may be held as public lands and disposed of by general lease. All such leases, however, may be terminated if the Department, with the approval of the Secretary of the Interior, gives notice that the leased lands are again required for the purpose of the act. The Secretary's authority under these sections is not merely ministerial or nondiscretionary, but rather calls for independent judgment and must be exercised consistent with the purpose and provisions of the act. The answers to your specific questions with respect to these provisions are as follows.

(a) The Secretary's authority under section 204 and 212 has not been expressly delegated under departmental regulations. In the past, the authority to approve exchange deeds has been exercised either by the Secretary or an Assistant Secretary upon recommendation of the Solicitor. This practice could also be followed under current departmental regulations.

(b) No formal guidelines or procedures have been established to ensure that state activity concerning Hawaiian home lands is approved by the Secretary where required by the act. In the past, the Department has relied upon the appropriate state officials to forward documents requiring secretarial approval to the Department since the Secretary's approval is necessitated only after initial action by the state agencies. However, since it is possible that the state government may have taken actions with respect to home lands in the past without the required approval of the Secretary, see *Keaukaha-Panaewa Community Assoc. v. Hawaiian Homes Commission, supra,* consideration will be given to establishing appropriate procedures to ensure that state action is, in the future, submitted for secretarial approval where required under the act.

(c) Departmental records indicate that five exchange deeds have been submitted for approval and approved under section 204(4) of the act since the enactment of the Hawaii Admission Act, as follows:

Three deeds of exchange between the Department of Hawaiian Home Lands and the State of Hawaii approved by Secretary Udall on April 9, 1962;

One deed of exchange between the Department of Hawaiian Home Lands and the State of Hawaii approved by Assistant Secretary Carver on June 19, 1962; and

One deed of exchange between the Department of Hawaiian Home Lands and the State of Hawaii approved by Secretary Udall on March 16, 1967.

I hope that this information will be helpful to the Commission in its study. If the Department can be of further assistance, please feel free to write Thomas W. Fredericks, Associate Solicitor, Division of Indian Affairs, Department of the Interior, Washington, DC 20240.

Sincerely,

/s/ Frederick N. Ferguson
DEPUTY SOLICITOR

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION
Washington, D.C. 20530

[Seal] August 13 1979

Mr. Philip Montez
Regional Office Director
Western Regional Office
United States Commission
on Civil Rights
312 North Spring Street
Los Angeles, California 90012

Dear Mr. Montez:

This is in response to your letter of August 1, 1979, concerning the Hawaii Admission Act of March 18, 1959, 73 Stat. 4, as amended, and the Hawaiian Homes Commission Act of 1920, as amended, 42 Stat. 108. The identical letter has been sent to the Secretary of the Interior.

As your letter points out, section 5(f) of the Admission Act requires that certain lands, including the Hawaiian home lands, conveyed by the United States to the State "... be held as a public trust for the support of the public schools and other public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of the native Hawaiians ... for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use." As noted by the Ninth Circuit,

section 5(f) contains an ambiguity since it arguably provides that the Hawaiian home lands may be used for the same general public purposes as other federal lands conveyed to Hawaii pursuant to the Admission Act. *Keaukaha–Panaewa Community Association v. Hawaiian Homes Commission,* 588 F.2d 1216, 1218, n. 2 (9th Circuit, 1979). A petition for certiorari is now pending in the Supreme Court. The subsection further provides that: "such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of the said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States."

In response to the specific questions raised in your letter, we offer the following:

1a. The Department of Justice would have the exclusive litigation authority if suit were brought by the United States to enforce the trust. The Department of the Interior has no authority to file lawsuits on behalf of the United States. It is our view, however, that individual beneficiaries of the trust may also file suit if they believe the trust to have been violated. In this respect, we disagree with the Ninth Circuit's decision in *Keaukaha–Panaewa, supra.*

1b. The authority to initiate litigation is discretionary, rather than mandatory.

1c. If a request is made to the Department of Justice by the Secretary of the Interior to initiate legal action against the State of Hawaii, we would review the request to determine if the case has legal merit and factual support. If we find that a meritorious case exists, we would file an action.

1d. No actions have been filed by the United States.

1e. The State of Hawaii has the responsibility to administer the lands in accordance with the Admission Act and the State's constitution and laws. If the State fails to fulfill this responsibility, the United States is authorized to bring suit to require the State to fulfill its responsibility.

2. The series of questions in Part 2 relate to the function of the Secretary of the Interior. We defer to the Department of the Interior with respect to these issues.

Sincerely,

/s/ James W. Moorman
James W. Moorman
Assistant Attorney General
Land and Natural Resources Division

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1539

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, KEAUKAHA-PANAEWA FARMERS ASSOCIATION, ISABEL LEINANI KNUTSON, ERMA KALANUI and APRIL KAMAKAOKALANIMALUNAO'E KALANUI, by her guardian ad litem, ERMA KALANUI, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees,

vs.

HAWAIIAN HOMES COMMISSION, BILLIE BEAMER, in her capacity as Chairman of the Hawaiian Homes Commission, THE DEPARTMENT OF HAWAIIAN HOME LANDS,

Defendants-Appellants,

and

COUNTY OF HAWAII, EDWARD HARADA, in his capacity as Chief Engineer, County of Hawaii,

Defendants,

and

JAMES W. GLOVER, LTD., A Hawaii Corporation,

Defendant.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CASES

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 78-1539

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, et al.,

Plaintiffs-Appellees,

vs.

HAWAIIAN HOMES COMMISSION, et al.,

Defendants-Appellants.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Plaintiffs-Appellees ("Petitioners") submitted to this court a petition for a writ of certiorari from the adverse decision in the above-entitled case of the United States Court of Appeals, Ninth Circuit, dated September 18, 1978 (Petitioners' Appendix D), as amended on denial of rehearing and rehearing en banc on January 9, 1979. The petition does not contain a copy of the circuit court's order of January 9, 1979. Petitioners claim to be native Hawaiians and intended beneficiaries of Hawaiian home lands. They commenced the action in the

United States District Court for the District of Hawaii to enjoin further construction of the Waiakea-Uka Flood Control Project which will allegedly destroy certain portion of such Hawaiian home lands, otherwise known as "available lands" as defined in the Hawaiian Homes Commission Act (HHCA), 1920, as amended. Petitioners claim that the flood control project violates their rights under Section 4 of the Admission Act of 1959, the Hawaiian Homes Commission Act of 1920, and Article XI of the Hawaii State Constitution. Defendants-Appellants ("Respondents") moved to dismiss the action on jurisdictional grounds but the District Court denied the motion (Petitioners' Appendix A). On Petitioners' motion for partial summary judgment, the District Court, stating its findings of fact and conclusions of law, rendered judgment granting the relief prayed for (Petitioners' Appendix B). In due time Respondents appealed to the circuit court. The Appellate Court requested the United States to submit a brief as amicus curiae on the jurisdictional aspects of the case (Petitioners' Appendix C) and the Respondents submitted a reply brief thereto (Respondents' Appendix I herein) which reply brief is hereby adopted as part of or supplement to this brief.

The Hawaiian Homes Commission Act, 1920, as amended, designated and reserved certain portion of public land in the then Territory now State of Hawaii for the use and benefit of native Hawaiians as defined in the Act. Pursuant to the provisions of Section 204(4), HHCA, Respondents, together with officials of the State Department of Land and Natural Resources initiated a land exchange to provide a replacement for the area to be used for the construction of the Waiakea-Uka Flood Control Project which is needed for the inhabitants of the place including native Hawaiians. The land exchange has not as yet been accomplished. Decisive effort, however, is being continuously and vigorously pursued to effect an exchange.

In our reply brief to the United States amicus curiae (Respondents' Appendix I) we pointed out that the HHCA has become and is now a state law and that the United States could

file a suit in federal court for a breach of any of the trust duties specified in Section 5(f) of the Hawaii Admission Act, Public Law 86-3, 73 Stat 4, (hereafter "Admission Act"), but that we don't agree that native Hawaiians can directly bring an action in federal court to enforce the trust provisions of Section 5(f) of the Admission Act. The District Court, while it traced out the rights of the Petitioners to have come from a federal law, sought to enforce in its decision the provisions of a state law, Section 204(4), HHCA. (See Dispositive portion of Petitioner's Appendix B)

Section 204(4) of HHCA, now a part of the Hawaii State Constitution, provides a power of review for the State Governor and the Secretary of Interior of the actions of defendants Hawaiian Homes Commission and Department of Hawaiian Home Lands regarding any questions of exchange of Hawaiian home lands. Fundamentally, this provision necessarily implies an exhaustion of this power of review before any such questions be brought to the proper court. Similarly, Section 207(c)(1)(A), HHCA, as amended, provides in part that "The Department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, . . . (A) churches, hospitals, public schools, post offices, and other improvements for public purposes." This provision is the basis of Respondents' grant of license to Defendant county of Hawaii to use the land for the construction of the flood control project, a public easement and a public improvement. The law does not specify that the easement or public improvement must exclusively or primarily serve the native Hawaiians. Any violations of the above cited provisions as parts of Hawaii laws are subject to the action or review by the Governor under his constitutional responsibility in the faithful execution of State laws and his supervisory powers over executive departments (Sections 5 and 6, Art. IV, State Const.). The District Court observed the possibility and propriety of administrative review by the State Governor and the Secretary of Interior (see p. 13a of Petitioners' Appendix B) who are, as the court said, "declared by law to have independent power of review" on alleged improper use or disposition

of Hawaiian home lands. This is a ground to decline court jurisdiction since the relief prayed for by the Petitioners may be obtained from the aforesaid administrative officials who, if given the chance, are presumed to decide correctly, *Abelleira v. Court of Appeals,* 109 P2d 942, 949 (1941); *Tennessee Enamel Manufacturing Co. v. Hake,* 194 SW2d 468, 183 Tenn. 615 (1946).

In substance the controversy does not genuinely reach or touch any questions of federal interest as the Petitioners try to impress and induce this court to believe. It is simply an attempt to enforce a state law upon an alleged violation thereof, *Southern Power Co. v. North Carolina Public Service Co.,* 263 US 508 (1924). The purpose of Petitioners' complaint is "to enjoin further construction of the Waiakea-Uka Flood Control Project which is claimed to destroy more than twenty acres of available Panaewa agricultural land, because the diversion of this land to the county of Hawaii for a flood control project violates their rights under Section 4 of the Admission Act, the Hawaiian Homes Commission Act of 1920, and Article XI of the Hawaii State Constitution." This is the same objective relied upon by the District Court when it issued its order of denial (Petitioners' Appendix A) of Respondents' motions to dismiss. The involvement of purely state laws is further demonstrated by the judgment granting the relief prayed for when the court found a violation of Section 207(c)(1) of the Hawaiian Homes Commission Act and it ordered Respondents to "complete a land exchange as soon as reasonably possible in compliance with Section 204(4)" of the HHCA.

The Constitution of Hawaii is undoubtedly a State law. The provisions of Hawaiian Homes Commission Act, 1920, as amended, are now parts of the State Constitution by virtue of Section 4, Admission Act and Section 4 of the Admission Act itself is now part of Article XI of the Hawaii Constitution pursuant to Section 7(b) and (c), Public Law 86-3. In accordance with Section 5(h) of the Admission Act, the HHCA ceased to be effective as a federal law upon admission of Hawaii into the Union. The HHCA is now a state law of Hawaii and it was already removed as part of the United States

Code; see also U.S. Amicus brief, Petitioners' Appendix C.

II. QUESTION PRESENTED.

"Do native Hawaiian beneficiaries of the Hawaiian Homes Commission Act, adopted by Congress for their especial benefit, have the right to obtain judicial review in federal court of violations of the Act and breaches of trust provisions imposed on the Hawaiian Homes program by Congress in the Hawaii Admission Act."

III. REASONS FOR DISALLOWANCE OF THE WRIT

A. Petitioners have no standing or private cause of action against Respondents.

B. The Court of Appeals' decision is not in conflict with any decisions of this court.

IV. ARGUMENTS

A. Petitioners have no standing or private cause of action against Respondents.

Respondents recognize and admit the imposition upon the State government of Hawaii certain trust obligations created by the provisions of HHCA and the Hawaii Admission Act over certain public lands including Hawaiian home lands known as "available lands" for the use and benefit of native Hawaiians while the legal title to said lands belongs to the State as grantee from the United States. The Respondents in behalf of the State are particularly charged, under the supervision of the State Governor, with the duties in the proper administration and disposition of Hawaiian home lands for its intended beneficiaries. The Admission Act prescribed certain conditions for Hawaii's admission into the Union and, among others, the conditions required the adoption of the provisions of HHCA as part of the State Constitution and the acceptance by the people of Hawaii of all the provisions of the Admission Act prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii. The provisions of HHCA relating to the management and disposition of the Hawaiian home lands was made a compact between the United States and Hawaii (Section 4, Admission

Act). The United States granted and vested title to all public lands, including "available lands" as defined in Section 203, HHCA, to the State of Hawaii (Section 5 (b), Admission Act) and such lands, proceeds, and income shall be managed and disposed of for any of the purposes prescribed by the United States in the manner as the Constitution and laws of the State may provide and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States, the grantor (Section 5(f)). Essentially the compact is a contract between the two sovereign and no third party is involved in the agreement. For any violation of the conditions of the agreement or grant of the public lands to the State, only the United States as grantor and former owner of such public lands, can demand the performance of the conditions thereof. *Ervien v. United States*, 251 U.S. 41, 48 (1919). The United States alone has the power to enforce the conditions of the grant by means of suitable action in a clear case of violations thereof, *Emigrant Co. v. County of Adams*, 100 U.S. 61 (1879), as the matter is between the grantor and the grantee, *United States v. Louisiana*, 127 U.S. 182, 189 (1888). It is for the United States to complain of any breach if there is any, and since Plaintiffs are not parties to the contract, they have no standing to invoke its provisions, *Hagar v. Reclamation District No. 108*, 111 U.S. 701 (1883).

It is true, Hawaiian home lands or "available lands" are entrusted to the State for certain specific use and purpose for the benefit of native Hawaiians, a class or group of persons which Petitioners claim to belong, but title to and ownership of the land in dispute remain in the State and it has not been disposed of or granted to the Petitioners for any specific use or purpose in accordance with the grantor's condition. The State owes its trust duties to the United States. Unless the trust lands are disposed of to the Petitioners for any of the purposes of the grant in *such manner as the constitution and laws of the State* may provide, no privity is established under which Petitioners may predicate an action. As intended beneficiaries of Hawaiian home lands, Petitioners have no right to enforce the trust; only the grantor can inquire into the manner of its execution,

Kings County, Washington v. Seattle School District No. 1, 263 U.S. 361 (1923).

The Admission Act did not create a private cause of action whereby Petitioners may enforce the trust duties and obligations imposed by the Admission Act. In the absence of statutory authority, express or implied, the Petitioners cannot enforce the trust against the State. (For more illustrative discussions please see Respondents' Appendix I). Neither the State Constitution which now embodies the provisions of the HHCA nor any other Hawaii statute contains a provision expressly or impliedly granting the institution of Petitioners' suit with the federal court. Examination of the provisions of the Admission Act, the State Constitution, the Hawaiian Homes Commission Act as amended (now read as part of the Constitution) including legislative proceedings behind them do not indicate any intent to grant a private remedy; rather, it is more apparent that legislative intent is to deny private cause of action. This is demonstrated by the express provision of Section 5(f) itself granting a cause of action to the United States for any violation of the conditions of the grant of such public lands held in trust by the State. If it were Congress' intent to create a private remedy it could have so provided conveniently since a cause of action or remedy at least for purposes of jurisdiction is not ordinarily assumed. This observation has also been noted by the Court of Appeals (9th Circuit) in its analysis and application of the criteria that determine an implied private cause of action, set forth by this Court in *Cort v. Ash*, 422 U.S. 66, 43 LEd2d 4773 (1975). The four factors which must all be present to satisfy implication of a private cause of action are:

(1) Is the statute a federal law enacted for the benefit of a class of which plaintiff is a member?

(2) Is there indication of legislative intent to create a private remedy?

(3) Is the implication of such a remedy consistent with the underlying purposes of the legislative scheme?

(4) Is implying a federal remedy inappropriate because

the subject matter involves an area basically of concern to the State?

The Circuit Court had found lacking one or more of the four factors in the case at bar. These four factors are the prevailing tests that determine the existence of an implied private cause of action. This court has found a complete application of the *Cort* tests in its recent decision in *Cannon v. University of Chicago*, No. 77-926, 47 LW 4549, May 14, 1979, which is, however, distinguished from the present case. In *Cannon* where a woman medical school applicant was denied admission by the University of Chicago to participate in Education programs supported by federal funds the court considered an implied private right of action by the Plaintiff in the interpretation of the provisions of the Education Amendments to the 1964 Civil Rights Acts prohibiting sex discrimination in education programs receiving federal assistance. The court declared the legislative history of Title IX of the Act, prohibiting sex discrimination, plainly indicates that Congress intended to create a private cause of action, and that Title IX was patterned after Title VI of the Civil Rights Act of 1964, and the drafters of Title IX explicitly assumed that it would be interpreted and enforced in the same manner as Title VI, which has already been construed as creating a private remedy when Title IX was enacted. The situation in *Cannon* is, however, different from the present case.

Applying the first test, the Civil Rights Act invoked in *Cannon* is a federal law applicable to all states and citizens of the United States. In the instant case the direct source of Plaintiffs' rights to Hawaiian home lands is the State Constitution which now embodies the Hawaiian Homes Commission Act since Hawaii became part of the Union in 1959. Administration of the HHCA has become purely a state affair. One does not go back to any federal law to consider and grant any specific use and purpose of Hawaiian home lands. Petitioners seem to rely on the provisions of Section 5(f) of the Admission Act but its trust provisions pertain to all public lands of the State of Hawaii and benefit all Hawaii citizens alike without special treatment to native Hawaiians. The remedy provided

to the United States is a public cause of action. Section 5(f) does not include a private cause of action and to imply such right would amount to a suit against the State without its consent, *Naganab v. Hitchcock*, 202 U.S. 473 (1906); *Oregon v. Hitchcock*, 202 U.S. 60 (1906); see also *In Re: Ayers*, 123 U.S. 443 (1887); *Morrison v. Work* 474 U.S. 481 (1925). Hawaiian home lands are community lands for native Hawaiians, and unless a fee or specific vested right is granted to a particular part of the land, title is vested in the State, and an individual or group of native Hawaiians cannot sue the State (see *Affiliated Ute Citizens of the State of Utah v. U.S.*, 431 F2d 349 (1970), 10th Circuit; *Omaha Indian Tribe v. Wilson*, State of Iowa, 575 F2d 622 (1978); *Cooper v. Roberts*, (18 How 173), 59 U.S. 173 (1855). Besides, as stated above, the Admission Act is a compact between the United States and Hawaii; it is a contract between two sovereign and the Plaintiffs are not parties to it. The United States was the grantor of the public lands to the State with certain conditions subsequent to be performed under the agreement. It has been held that no one can take advantage of the nonperformance of a condition subsequent annexed to an estate in fee except the grantor. The same rule applies to a grant upon conditions subsequent proceeding from the government (*Alabama v. Schmidt*, 232 U.S. 168 (1914); see also *Schulenburg v. Harriman*, 21 Wall 44 (1874); *Spokane & Co. v. Washington R. Co.*, 219 U.S. 166 (1911); *U.S. v. Northern Pacific Railway Co.*, 152 U.S. 284 (1894). It is hard to imagine every dissatisfied native Hawaiian citizen suing the state and its officers against all sovereign functions in the administration and disposition of public lands, including Hawaiian home lands, in the state.

As to the second test prescribed by *Cort*, it is quite apparent that there was no indication of legislative intent to create a private remedy under Section 5(f) of the Admission Act. This seems clear from Congressional records and deliberations behind the enactment of the Admission Act and even HHCA and the Constitution of Hawaii.

The third test in *Cort* requires that an implied private remedy must be compatible with the general scheme and

purpose of the law granting the basic right. In the case at bar, it is rather the clear intention of the Admission Act to place complete ownership and responsibility over Hawaiian home lands programs to the State by making HHCA part of the Constitution and that Section 5(f) of the Admission Act provides that the disposition and management of the public land trust which include the Hawaiian home lands shall be *in such manner as the Constitution and laws of said State may provide.*

The last *Cort* element asks whether or not implying a federal remedy is inappropriate because the subject matter involves an area basically of concern to the State. The Hawaiian home lands program, as pointed out above, has been relegated to state law and is a purely state affair since the admission of Hawaii into the Union about twenty years ago when the United States transferred its control and interest in Hawaiian home lands. Management and disposition of such lands are now matters of state laws and concern. Petitioners' complaint is actually based on the Constitution (provisions of HHCA) which they now seek to enforce (see Plaintiffs' complaint). Finally, the prosecution of the Hawaiian Homes program is carried on and supported purely by State funds and no federal interest or fund is involved. It is therefore most appropriate that Petitioners' problem be treated under Hawaii laws and judicial system as found by the Court of Appeals.

B. The Court of Appeals' decision is not in conflict with any decisions of this Court.

Petitioners try to emphasize the application in this case of certain American Indian cases on lands held in trust by the United States. Notably among the important ones are, *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) and *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365 (1968). In *Oneida,* the land is a tribal land belonging to the Oneida Indian tribes and recognized by a treaty and federal statute. The right to possession of this land is claimed to arise under a federal law *in the first instance.* The aboriginal title of Indian tribe as an independent governing body has never been extinguished. Indeed this court has stated in the *Oneida case,* at 684, under the

concurring opinions of Justices Rehnquist and Powell that "the opinion of the Court today should give no comfort to persons with garden-variety ejectment claims who for one reason or another, are covetously eying the door to the federal courthouse. The general standards for determining federal jurisdiction, and in particular the standards for evaluating compliance with the well-pleaded complaint rule, will retain their traditional vigor tomorrow as today."

In *Poafpybitty,* the Indians are expressly authorized to institute proceedings against the United States to establish their right to an allotment (see 25 U.S.C. § 345). The parties to the case are lessor and lessee and the Indians are granted right of action against the United States to enforce their right for allotment.

In another case, *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), the right to bring action by the Indian tribe is derived from the legislative history of 28 U.S.C. § 1362 which grants standing to the tribe which has a self-governing body recognized by the Secretary of Interior. The case at bar is not really parallel or similar to any of the above-cited cases relied upon by the Petitioners. These cases have their own peculiar circumstances as distinguished from the present case.

Examination of this court's holdings in the above-cited cases relied upon by the Petitioners shows that the requisites in *Cort v. Ash, supra,* were satisfied. Private rights of action were either expressly provided or clearly implied by Congress. History of enabling acts admitting the different states into the Union do not generally grant private cause of action to enforce public land trust obligations of the states, *Murphy, et al. v. State,* 181 P2d 344 (1947). Neither the Admission Act of Alaska (July 7, 1958, Public Law 85-508, 72 Stat. 339), which was followed by Hawaii (Public Law 86-3, 73 Stat. 4), provides any such right of action on trust lands against that state. The more restricted land grants started from the admission of New Mexico and Arizona in 1910 but no such right was ever granted. Over all, we find no general law applicable to all American Indians or native Americans as granting private

cause of action in the enforcement of rights on trust lands held by the states. The rights are rather found, if at all, in special statutes particular to specific groups of Indians or native Americans where Congress intended expressly or impliedly to grant the right. To treat the native Hawaiians differently by granting them a private right of action in a general law or in the Admissions Act, assuming that they are also Indians or native Americans, would be contrary to legal principles developed by this court.

V. CONCLUSION

This court should deny a writ of certiorari because Petitioners have no cause of action. Petitioners' action is in effect a suit against the State without its consent. There is really no federal interest or question involved as Plaintiffs' complaint is based on state laws. The decision of the court of appeals in above-entitled case is in harmony with the decisions and rulings enunciated by this court in the cases disposed of by it and those acted upon by the other appellate court.

Respectfully submitted,

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Appendix I

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KEAUKAHA-PANAEWA COMMUNITY ASSOCIATION, et al.,	) CIVIL NO. 77-1044
Plaintiffs-Appellees,	)
vs.	)
HAWAIIAN HOMES COMMISSION, et al.,	)
Defendants-Appellants.	)

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

REPLY BRIEF OF APPELLANTS TO BRIEF OF THE UNITED STATES, AMICUS CURIAE

I. INTRODUCTION

Appellants concur in the following views of the United States:

1. The Hawaiian Homes Commission Act, 1920, as amended (hereinafter referred to as "HHCA"), is a law of the State of Hawaii and is no longer a federal law;

2. The fact that the HHCA was required to be "adopted as a law of the state", as a compact with the United States, does not operate to make the HHCA a federal law; and

3. The United States could have properly maintained a suit in federal district court for a breach of any of the trust duties specified in Section 5(f) of the Hawaii Admission Act, 73 Stat. 4.

Appellants, however, do not agree that native Hawaiians can properly bring suit in federal court to enforce the trust provisions of Section 5(f) of the Hawaii Admission Act.

By the Admission Act of March 18, 1959, 73 Stat. 4, hereafter "Admission Act", Congress granted to the State of Hawaii, effective upon its admission into the Union, title to certain of its public lands, title to which was held by the United States immediately prior to Hawaii's admission as a State. Section 5(b) of the Admission Act provides as follows:

> (b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

Congress imposed certain trust conditions upon the lands granted to the State. Section 5(f) of the Admission Act, provides in pertinent part as follows:

> (f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and

> other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use . . . The schools and other educational institutions supported in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

Congress, by way of Section 7(b) of the Admission Act, required that the people of Hawaii vote on three questions, each requiring an affirmative majority vote if Hawaii were to be admitted to the Union:

(1) Shall Hawaii be admitted?
(2) Are the state boundaries set by the act approved?
(3) Are the provisions of the act with respect to the disposition of public lands in Hawaii approved?

The three-fold proposition was submitted to the Hawaii electorate at the primary election of June 27, 1959. The ballots of the voters were in the affirmative. The State of Hawaii accepted the grant of the lands upon the conditions and limitations imposed. (See 1 Attorney General's Office and Public Archives, *Proceedings of the Constitutional Convention of Hawaii*, 1950 (Preface, p. v.)).

In *State of Hawaii v. Zimring*, 58 Haw. 106, 566 P. 2d 725 (1977), the State Supreme Court had occasion to consider the question of the public lands conveyed by Congress to the State of Hawaii upon its admission into the Union. It stated, at p. 125:

> The beneficial ownership of the people of Hawaii was again acknowledged in the Admission Act, wherein Congress provided that the public lands conveyed to the State upon admission "shall be held by said State as a *public trust* for the support of the public schools and other public [educational] institutions, for the betterment of conditions

of native Hawaiians . . . for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provisions of lands for public use."

Excepting lands set aside for federal purposes, the equitable ownership of the subject parcel and other public land in Hawaii has always been in its people. *Upon admission, trusteeship to such lands was transferred to the State, and the subject land has remained in public trust since that time.*

Thus, it appears clear and settled that the lands conveyed to the State of Hawaii upon its admission into the Union by Congress are imposed with conditions of public trust for the purposes enumerated in the Admission Act. The lands granted to the State and the proceeds from the sale or other disposition of said lands and income therefrom are held in trust for five enumerated purposes:

1. for the support of the public schools and other public educational institutions;
2. for the betterment of conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended;
3. for the development of farm and home ownership on as widespread a basis as possible;
4. for the making of public improvements; and
5. for the provisions of lands for public use.

For any breach of trust, the United States is authorized to bring suit. Section 5(f) of the Admission Act provides in pertinent part that:

> Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

II. ARGUMENTS

A. The Admission Act forms a contract between the State of Hawaii and the Nation and Appellees *have no right to enforce the terms thereof.*

The lands in controversy form a part of the total public lands granted by Congress to the State as trustee. Congress granted these lands to the State in trust "with the understanding that, as trustee, it should use them in the best possible manner for accomplishing the trust purposes." *Stearns v. Minnesota,* 179 U.S. 223, 240 (1900). Congress, acting for the United States, the owner of the lands, "being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions." *Ervien v. United States,* 251 U.S. 41, 48 (1919).

The right of Congress to impose such conditions in the admission of a State into the Union is not questioned for it has been stated in *Coyle v. Oklahoma,* 221 U.S. 559, 574 (1911), that:

> It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as . . . regulations touching the sole care and disposition of the public lands or reservations therein which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

See also, Lassen v. Arizona Highway Department, 385 U.S. 458, n. 3, (1967), for a discussion as to total acreage of lands granted to the states for all purposes, and *Alamo Land and Cattle Co. v. Arizona,* 424 U.S. 295 (1976). Nor can it be doubted that the State of Hawaii had the power to accept the trust conditions imposed by Congress, for it is well recognized that "[T]he right of a state to accept such a trust cannot now be doubted. It has become a part of the judicial history of the country." *Stearns v. Minnesota, supra,* p. 240.

And, as has been stated earlier, where Congress granted lands in trust, "it has long since been settled that Congress alone can inquire into the manner in which the State executed that trust and disposed of the lands" *Stearns v. Minnesota, supra,* pp. 231-32; and that "Congress alone has the power to enforce the conditions of the grant, either by revocation thereof, or other suitable action in a clear case of violations of the conditions." *Emigrant Co. v. County of Adams,* 100 U.S. 61 (1879).

The State of Hawaii accepted the trust created by the Act of Congress. "Acceptance by the trustee of the obligations created by the donor of the trust completes a contract." *Stearns v. Minnesota, supra,* p. 249. Such a contract "is a matter between two sovereign powers" *United States v. Louisiana,* 127 U.S. 182, 189 (1888) and "when the State accepted its benefits, it is for the United States to complain of the breach if there by any. The Plaintiff is not a party to the contract, and is in no position to invoke its protection." *Hagar v. Reclamation District No. 108,* 111 U.S. 701, 712-13 (1883).

B. The United States, having imposed the trust by way of the Admission Act, only the United States can enforce its terms.

It has long been settled that where lands were granted by Congress to a state as trustee, Congress alone can inquire into the manner in which the state executed that trust and disposed of the lands. *Emigrant Co. v. Adams County, supra,* p. 69; *Stearns v. Minnesota, supra; Ervien v. United States, supra.*

A case somewhat analogous to the case under consideration is *King County, Washington v. Seattle School District No. 1,* 263 U.S. 361 (1923), wherein the Court held the beneficiary of the Act of Congress not to have standing. This was a suit brought by Seattle School District No. 1 seeking to have King County and its treasurer declared to be trustees and requiring them to account for certain moneys received and to pay the sum claimed.

The Act of Congress directed that 25 percent of all moneys received from each forest reserve during any fiscal year be

paid at the end thereof by the Secretary of the Treasury to the state in which the reserve was situated to be expended as the state legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve was situated.

The Secretary of the Treasury paid over to the State the proper amounts for the years from 1908 to 1918, inclusive. A part of the Snoqualmie Forest Reserve was in King County, and the proportionate amounts for these years, aggregating $20,106.07, were turned over by the State to the County Treasurer. For the years 1908, 1916, 1917 and 1918, the County Commissioner directed that one-half of the amount be apportioned to the county school fund and one-half to the road and bridge fund; and for each of the years from 1909 to 1915, inclusive, directed that all be assigned to the road and bridge fund.

The appellee was one of the school districts of the county. The appellee had urged that the Act of Congress permitted the money received by the county to be expended by the county and required an equal distribution annually for the benefit of public schools and public roads of the county.

The Court did not agree with the contention of the appellee. The Court, at pp. 364-65, determined that:

> When turned over to the State, the money belongs to it absolutely. There is no limitation upon the power of the legislature to prescribe how the expenditures shall be made for the purposes stated, though, by the Act of Congress, "there is a sacred obligation imposed on its public faith." (Citations omitted.) No trust for the benefit of the appellee is created by the grant. But, *assuming the moneys paid over to the State are charged with a trust* that there shall be expended annually one-half for schools and one-half for roads, *the appellee has no right to enforce the trust. Congress alone can inquire into the manner of its execution by the State.* (Emphasis added.)

The Court held, at p. 365, the Appellee had "no standing" to object to the distributions made by the county commissioners.

C. The Admission Act creates no cause of action whereby Appellees may enforce the duties and obligations imposed by the Admission Act.

In the case of *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), the Supreme Court had occasion to determine the enforceability of the Rail Passenger Service Act of 1970 (Amtrak Act). Three issues were presented: 1) federal court jurisdiction under the terms of the Act to entertain such a suit; 2) whether the Act can be read to create a private right of action to enforce compliance with its provisions; and 3) whether the respondent had standing to bring such a suit. However, the Court stated, at p. 456, that:

> [T]he threshold question clearly is whether the Amtrak Act or any other provision of law creates a cause of action whereby a private party such as the respondent can enforce duties and obligations imposed by the Act; for it is only if such a right of actions exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it.

The National Association of Railroad Passengers (NARP) brought this action in the district court to enjoin the announced discontinuance of certain passenger trains that had previously been operated by the Central of Georgia Railway Co. (Central). The defendants were Central, its parent, Southern Railway Co. (Southern), and the National Railroad Passenger Corp. (Amtrak).

After the enactment of the Rail Passenger Service Act of 1970 (Amtrak Act), Central contracted with Amtrak for the latter to assume Central's intercity rail passenger service responsibilities. Southern had not entered into any contract with Amtrak. The train discontinuances that precipitated the action were announced by Amtrak pursuant to § 404(b)(2) of the Amtrak Act, 45 U.S.C. § 564(b)(2). The gravamen of NARP's complaint was that these discontinuances were not authorized, and in fact were prohibited, by the Amtrak Act.

The District Court concluded that NARP lacked standing

under § 307 of the Amtrak Act and dismissed the action. On appeal, the Court of Appeals for the District of Columbia Circuit reversed, holding that NARP had standing and that § 307 does not otherwise bar such a suit by a private party who is allegedly aggrieved.

On appeal to the Supreme Court, after a review of the Act, the Court found, at p. 456, that:

> The only section of the Act that authorizes any suits to enforce duties and obligations is § 307(a) which provides:
>
> "If the Corporation or any railroad engages in or adheres to any action, practice or policy inconsistent with the policies and purposes of this chapter, obstructs or interferes with any activities authorized by this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interference, refusal, failure or neglect, the district court of the United States for any district in which the Corporation or other person resides or may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to prevent or terminate any violation, conduct, or threat."

After analyzing the legislative history of the Act, the Court concluded, at p. 457, that:

> In light of the language and legislative history of § 307(a), we read it as creating a public cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the Act. The only private cause of action created by that provision, however, is explicitly limited to "a case involving a labor agreement." Thus, no authority for the action the respondent has brought can be found in the language of § 307(a). The argument is made, however, that § 307(a) serves only to authorize certain suits against Amtrak and that it should

not be read to preclude other private causes of action for the enforcement of obligations imposed by the Act.

The respondent claims that railroad passengers are the intended beneficiaries of the Act and that the courts should therefore imply a private cause of action whereby they can enforce compliance with the Act's provisions.

The Court, at p. 464, said:

> [W]e hold that § 307(a) provides the exclusive remedies for breaches of any duties or obligations imposed by the Amtrak Act, and that no additional private cause of action to enforce compliance with the Act's provisions can properly be inferred.

Recently, this court, in *City of Palo Alto v. City and County of San Francisco,* 548 F.2d 1374 (9th Cir. 1977), had occasion to consider the *National Railroad Passenger Corp.* case. This court found it unnecessary to decide whether the Raker Act created a private cause of action on behalf of appellees under the reasoning of the *National Railroad Passenger Corp.* Instead, this court decided that the Bay Cities were intended to be direct beneficiaries of the Raker Act and accordingly, had standing to assert a violation of that Act. The basis for this decision was cited as *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1 (1974). The question for determination in *Hardin* was whether Congress had prohibited the Tennessee Valley Authority (TVA) from competing in the sale of electricity with Kentucky Utilities Company. Kentucky Utilities had filed this suit against TVA and others charging them with conspiracy to destroy its Tazewell business and asked the court to enjoin TVA from supplying power to the municipal system in alleged violation of § 15d of the Tennessee Valley Authority Act of 1933, as amended. It was contended by petitioners that the Kentucky Utilities Company lacked standing to challenge the legality of TVA's activities. To that argument, the Supreme Court stated, at pp. 5-7:

> This Court has, it is true, repeatedly held that the economic injury which results from lawful competition cannot, in and of itself, confer standing on the injured business to question the legality of any aspect of its com-

> petitor's operations. (Citations omitted.) But competitive injury provided no basis for standing in the above cases simply because the statutory and constitutional requirements that the plaintiff sought to enforce were in no way concerned with protecting against competitive injury. In contrast, it has been the rule, at least since the *Chicago Junction Case,* 264 U.S. 258 (1924), that when the particular statutory provision invoked does reflect legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. (Citations omitted.)
>
> Petitioners concede . . . that one of the primary purposes of the area limitations in § 15d of the Act was to protect private utilities from TVA competition. This is evident from the provision itself and is amply supported by its legislative history . . . [I]t is clear and undisputed that protection of private utilities from TVA competition was almost universally regarded as the primary objective of the limitation. Since respondent is thus in the class which § 15d is designed to protect, it has standing under familiar judicial principles to bring this suit (citations omitted), and no explicit statutory provision is necessary to confer standing.

Adopting the rationale in *Hardin,* this court, in justifying its determination, traced the legislative history of the Raker Act and found, at p. 1377, that:

> While the Bay Cities are not expressly denominated as co-grantees without the consent of San Francisco, the legislative debates indicate that this omission does not alter the co-grantee characterization of the Bay Cities. Indeed, the drafters of the Act concluded that it would be redundant to designate the Bay Cities as co-grantees because the assumption in drafting the Act was that both San Francisco and the Bay Cities would share in the benefits of the Act.

On appeal, the appellants had also urged the court's consideration of the provisions of Section 9(a) and 10 of the Raker Act. Section 9(a) provided that if the grantee did not abide by the conditions of the grant, the Secretary of Interior may ask the Attorney General to bring suit to enforce them. Section 10

gave certain irrigation districts the right to commence a suit to enforce the rights granted them under the Act. Despite the language of these provisions, this court concluded, at p. 1378:

> The Bay Cities played a leading role among the dramatis personae in the passage of the Raker Act. Their support for the bill, their financial backing of the Hetch Hetchy facility and their growing demand for water were crucial factors in the passage of the Act. The legislative history and the language of the Act unmistakably reveal that the Bay Cities were intended to be equal beneficiaries with San Francisco of the Hetch Hetchy Grant, and thus equally entitled to enforce the conditions to that grant.

While we do not agree with the Court's conclusion reached therein in light of the Supreme Court's decision in *National Railroad Passenger Corp.*, the case under consideration is clearly distinguishable. First, in light of the Admission Act, it would strain one's imagination to consider the appellees, as well as the State, to be "co-grantees" of the land held in trust. To so construct the grant would either entitle the other beneficiaries enumerated in the Admission Act to be "co-grantees", or make appellees co-grantees of all public lands granted to the State by the Admission Act. The clear language of the Act, as well as the legislative history, refutes such a conclusion. Second, the Admission Act expressly provides for a public cause of action only. To construe the Admission Act as providing for a private cause of action to appellees would wreak havoc upon not only well settled principles of law hereinbefore stated but create new rights in beneficiaries of land grants made by Congress to the various states since 1803. (*See, Lassen v. Arizona, supra,* p. 461 n.3). Finally, and perhaps, most important, it would seem that the primary purpose for the formulation of the Admission Act was not to benefit any particular people or group. Rather, its primary purpose would seem to be that of establishing the relationship between the national and state governments. Thus, it is inconceivable to believe that the appellees are within the "class" that the Admission Act is designed to protect.

D. Appellees, absent express statutory authority, cannot enforce the trust against the State.

The United States, in its amicus curiae brief, cites the case of *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968), as the basis for its contention that appellees are entitled to bring suit in the United States District Court to compel compliance with the trust provisions. This case is clearly inapplicable.

Poafpybitty presented the question of whether petitioners, who were all Comanche Indians, had standing to sue under an oil and gas lease approved by the Department of Interior for use on land held by Indians under trust patents issued by the United States. In the case, the Indians, as lessors, had executed an oil and gas lease to Skelly Oil Company, the lessee, on the form prescribed by the Department of Interior. The Commissioner of Indian Affairs had given his approval. Petitioners claimed Skelly Oil had permitted natural gas being produced from the wells to escape despite the fact that there was a pipeline less than a mile from the land. Petitioners claimed that Skelly Oil ignored their request that the gas be marketed and continued to allow the gas to be wasted in violation of the terms of the lease. The Oklahoma District Court dismissed the petition and the Supreme Court of Oklahoma affirmed on the ground that petitioners were precluded from suing by the provisions of the lease and by regulations promulgated by the Secretary of Interior to control oil and gas leases on restricted Indian land. In its discussion, the Court stated, at pp. 370-71:

> Later decisions followed the implications of *Heckman* and held that the right of the United States to initiate a suit to protect the allotment did not diminish the Indian's right to sue on his own behalf. In *Creek Nation v. United States*, 318 U.S. 629 (1943), this Court held that Indian tribes had the power to sue a railroad for the improper use of Indian land even though the tribes could not sue the United States for its failure to collect the sums allegedly due. The Court stated, "That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions." (Citations omitted.) Nor does the existence

of the Government's power to sue affect the rights of the individual Indian. "A restricted Indian is not without the capacity to sue or to be sued with respect to his affairs, including his restricted property. . . . both the Act of April 12, 1926 and the decision . . . in Heckman v. United States . . . recognize capacity in a restricted Indian to sue or defend actions in his own behalf subject only to the right of the Government to intervene."

The Court, after reviewing the lease and the regulatory scheme, found that nothing in the lease or regulations required the Indians to seek administrative action from the Government instead of instituting legal proceedings on their own. The Court held, at p. 376, that "the Indian lessors have the capacity to maintain an action seeking damages for the alleged breach of the oil and gas lease."

Similar holdings can be found in *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465 (9th Cir. 1975) and *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976).

In each of these cases, the matter concerned 1) the United States, trustee; 2) Indians, beneficiaries; and 3) third parties—Skelly Oil Co. *(Poafpybitty)*, State of New Mexico *(Aamodt)*, and Helix Irrigation District *(Capitan Grande Band of Mission Indians)*. None of the cases involved the Indian beneficiary bringing an action against the United States, the trustee. However, in the *Poafpybitty* case, the Court did address the issue we are concerned with in the case under consideration when it stated, at p. 370:

> In *Creek Nation v. United States*, 318 U.S. 629 (1943), this court held that Indian tribes had the power to sue a railroad for the improper use of Indian land even though *the tribes could not sue the United States* for its failure to collect the sums allegedly due. (Emphasis added.)

And, in footnote 8, *id.*, the Court noted, "Indians of course are now authorized to bring claims against the United States. See Indian Claims Commission Act, 60 Stat. 1049 (1946), 25 U.S.C. § 70-70W."

Perhaps this concept is best expressed in Restatement

(Second) of Trusts, Section 95 (1959), relating to the United States or a State holding property in trust, which provides that:

> The United States or a State has capacity to take and hold property in trust, but in the absence of a statute otherwise providing the trust is unenforceable against the United States or a State.

In Section a. of the Commentary to § 95, it is there expressed that "As against the United States or a State the only remedy of the beneficiary is by a special act of the legislature, unless a proceeding in a Court of Claims or other tribunal is provided by statute."

Nothing in the Admission Act nor any statute known to appellants authorizes the appellees to enforce the trust provisions of the Admission Act. This does not mean, however, that a native Hawaiian beneficiary, who, having received a lease issued to him under the provisions of the Hawaiian Homes Commission Act, 1920, as amended, is in any way prohibited from bringing an action against a third party in a proper circumstance. Once having obtained a proprietary interest in a tract of Hawaiian home lands, assuming compliance with the lease terms and conditions and the provisions of the Hawaiian Homes Commission Act, 1920, as amended, such a beneficiary would have capacity to sue or to be sued in a State court to enforce the provisions of the lease.

III. CONCLUSION

For the foregoing reasons, Appellants respectfully submits that the judgment of the Court below should be reversed with instructions to dismiss the action.

DATED: Honolulu, Hawaii, June 30, 1978.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles F. Fell, hereby certify that on this 18th day of June, 1979, three copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, airmail postage prepaid, to the following Counsel:

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I further certify that all parties required to be served have been served.

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